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# Contents

THE WORK OF THE MISSISSIPPI SUPREME COURT, 1946-1947

I. Criminal Law ..... *Oliver M. Hornsby* 1
II. Domestic Relations ..... *Hugh N. Clayton* 12
III. Insurance ..... *George T. McClintock* 19
IV. Pleading, Practice and Procedure ..... *Ed. H. Green* 21
V. Public Law and Taxation ..... *Sam V. Pack* 31
VI. Torts ..... *Stovall Lowrey* 37
VII. Trusts and Wills ..... *C. Sidney Carlton* 51

NOTES

Special Appearance in Mississippi ..... 59
Taxation of Illegal Activities ..... 82
Formation and Organization of a Private Business Corporation in Mississippi ..... 87

RECENT DECISIONS

Adjoining Landowners—Legality of Spite Fence—Materiality of Motive and Usefulness ..... 98
Constitutional Law—Due Process—Double Jeopardy—Right to Execute Death Sentence After First Attempt Fails 99
Constitutional Law—Due Process—Equal Protection—The "Blue Ribbon Jury" ..... 101
Corporations—Officer-Director Fixing Own Salary—Ratification ..... 103
Criminal Law—Husband and Wife—May One Spouse Commit Larceny of the Individual Property of the Other? ..... 106
Criminal Law—When Does A Fact Tend to Incriminate Sufficiently to be Within the Doctrine of Immunity? ..... 108
Disbarment Proceedings—Their Nature—Who May Institute the Proceedings ..... 109
Domestic Relations—Duty of Father to Support Minor Child—Means of Enforcement ..... 110
Municipal Corporations—Liability for Torts of Policeman ..... 112
Parent and Child—Right of Child to Maintain Action Against Third Person for Enticing Parent from Home ..... 114
Real Property—Life Estates—Removal of Fixtures ..... 116
Searches and Seizure—General Exploratory Search as Incident to Arrest is Not Unreasonable Under Edict of Fourth Amendment ..... 118

BOOK REVIEW

Model Probate Code ..... *Phil Stone* 122

STATE BAR SECTION

The Proposed Uniform Divorce Recognition Act ..... *Dugas Shands and G. B. Witherspoon* 124

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# THE WORK OF THE MISSISSIPPI SUPREME COURT, 1946-1947†

## I

## CRIMINAL LAW

*Oliver M. Hornsby**

The decisions of the Mississippi Supreme Court during the past year in the field of Criminal Law have been divided among eight sub-headings for discussion herein.

### Arrest

The case of *Copeland v. State*,[1] citing and quoting with approval from *Baldwin v. State*,[2] *Fulton v. City of Philadelphia*[3] and *Garske v. United States*,[4] holds:

> A misdemeanor is being committed in "presence of an officer," so as to authorize an arrest, when he acquires knowledge thereof through one of his senses or inferences properly to be drawn from testimony of the senses.

Appellant was convicted of the unlawful possession of intoxicating liquor. The arresting officer testified that as defendant came toward him, in a drunken condition, his coat blew back and thereupon revealed a bottle in defendant's inside coat pocket. The officer also smelled whiskey on defendant, and thereupon arrested him. A reversal of the case was sought upon the ground that although the bottle in appellant's possession was found to contain whiskey after it was removed from his pocket pursuant to his arrest, the sheriff did not know that such was

†This review covers the period beginning with the September, 1946, term, and extending through the March, 1947, term. For previous reviews, see 11 Miss. L. J. 1 (1938), 12 Miss. L. J. 1 (1939), 13 Miss. L. J. 1 (1940), 14 Miss. L. J. 1 (1941), 15 Miss. L. J. 1 (1942), and 18 Miss. L. J. 1 (1946).

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[1]30 So.(2d) 509 (Miss. 1947).
[2]175 Miss. 316, 167 So. 61 (1926).
[3]168 Miss. 30, 148 So. 346 (1933).
[4]41 F.(2d) 620, 623 (C.C.A. 8th 1924).

the case until after he had made the arrest. It was argued, therefore, that the arrest was unlawful and the testimony of the sheriff was incompetent and inadmissible since the officer did not know that the defendant was committing a misdemeanor in his presence (by having intoxicating liquor in his possession) until after the arrest without a warrant. The officer did not see the contents of the bottle while it was in appellant's pocket, but he testified that the appellant was drunk, that he saw the label on the bottle, and smelled whiskey on appellant.

In announcing that while the case may be thought to be on the borderline, nevertheless, under the rule of *Baldwin v. State, supra,* the other authorities cited and the references therein contained, the Court here concluded that the testimony of the sheriff disclosed much more than a mere suspicion on his part that a misdemeanor was being committed in his presence. The judgment and sentence of the trial court was affirmed.

### Assault and Battery

In a trial on a charge of felonious assault and battery with intent to kill and murder, it is not essential that the prosecuting witnesses be able to testify positively of their own knowledge as to the identity of the weapon used where the proof is ample to show and the jury is warranted in concluding from the nature of the wound that it had been inflicted by a knife. In *McGinnis v. State*[5] the Court held that the use of a knife could be determined from all of the facts and circumstances presented.

This case likewise presents the question of the constitutionality of certain sections of the Youth Court or Juvenile Court Act of 1940. The applicable law before the Court has now been repealed through the enactment of Chapter 207 of the Laws of 1946. Sections 7203 and 7204 of the Code of 1942, under scrutiny by the Court, now appear in somewhat different language as Sections 15 and 16 of Chapter 207 of the Laws of 1946, the effective date of which was October 1, 1946.

In *Webb v. State,*[6] where on review the evidence did not justify the verdict of the jury that the assault was made with the intent to kill and murder, the Court held that the verdict was a finding that appellant was guilty of assault and battery, and the case, therefore, was remanded for sentence only for simple assault and battery.

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[5]29 So.(2d) 109 (Miss. 1947).
[6]30 So.(2d) 894 (Miss. 1947).

## Burglary

The Court holds in *White v. State*[7] that the prosecution is permitted to inquire as to previous convictions only as such affect the credibility of the witness.

Appellant was convicted of burglary and on appeal assigned as error the action of the trial court in permitting the State to make proof as to a withdrawn plea of guilty to a burglary charge on a former occasion. It appears that on a former occasion the appellant for a separate offense had been indicted for burglary and had entered a plea of guilty thereto. Subsequently, he was allowed to withdraw his plea of guilty to the crime of burglary and entered a plea of guilty to the crime of willful trespass. On this trial, on direct examination, the defendant stated that he had previously been convicted of the offense of willful trespass. On cross examination, the prosecuting attorney was permitted to inquire as to the circumstances under which the plea of guilty to willful trespass had been entered for the purpose of showing that there had been a withdrawn plea of a greater offense, wholely disconnected with the charge on which the defendant was being tried at the time. The Court held such to be prejudicial error and held that whereas Section 1693 of the Code of 1942 authorizes the examination of any witness as to his conviction of any crime, it does not go so far as to permit such examination in regard to any withdrawn plea of guilty to a separate and distinct offense. The State relied upon *Jenkins v. State,*[8] wherein the accused, after pleading guilty before a justice of the peace, appealed to the circuit court and the prosecution was permitted to prove the plea of guilty as a confession of the particular crime for which he was being tried on the appeal. The Court held there that the plea of guilty in such case amounted to no more than an extra-judicial confession of the crime for which he was then on trial in the circuit court. The Court here, however, says that the *Jenkins* case did not go so far as to hold that what amounts to no more than extra-judicial confessions of separate and distinct offenses is admissible in evidence where the defendant has not put his character in issue, and that after the defendant had testified as to his previous conviction for willful trespass the inquiry along that line should have been ended, unless the prosecution desired to inquire as to his conviction of other offenses based upon a plea of guilty or a conviction disclosed by the judgment of some court.

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[7]30 So.(2d) 894 (Miss. 1947).
[8]98 Miss. 717, 54 So. 158 (1911).

### Embezzlement

In *Murphree v. State*[9] the appellant was convicted of failing to pay over to the Motor Vehicle Commissioner public funds which came into his possession by virtue of his public employment as Chief Clerk in the License Tag Division of the State Motor Vehicle Commission. On appeal the judgment of the lower court was reversed, and the appellant discharged.

The proof disclosed that the custom of the office at the time was that when cash or checks were received and permits issued therefor, the checks or money, together with duplicate permits, were placed by the various employees of the office in a common box or container. At the end of the day, or the next day, an accounting was made to ascertain whether the checks and cash balanced with the duplicate copies of the permits. No cross reference was made to the triplicate copy of the permit remaining in the book out of which the permits had been issued. Under such practice it was possible, therefore, for any one of a number of employees to remove from the box before the accounting any one or more of the duplicate permits together with the corresponding amount of cash or checks. The system employed was already in effect at the time the appellant entered his employment as Chief Clerk, and it was not shown that any legal requirement placed on him the responsibility of changing the system.

As suggested by the Court, proof as to who may have removed from the box the duplicates of the permits in question was dependent entirely upon circumstantial evidence, and it is well-settled by the criminal law of this State that where the guilt of an accused in based upon circumstantial evidence alone, the proof thereof must exclude every other reasonable hypothesis consistent with innocence. Says the Court: "Unless the proof is otherwise sufficient to show that the accused got the $356.00, the fact that he is designated 'Chief Clerk' will not suffice to justify a verdict of guilty."

It appears in this case that the State contended that the appellant was not indicted for the unlawful conversion of these funds to his own use, but for failing to account for and pay the same over to the Commissioner upon the theory that this money had come into his possession as Chief Clerk and that therefore, "It became immaterial as to who actually made away with the money." The State cited *Hemingway v. State*,[10]

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[9]28 So.(2d) 238 (Miss. 1946).
[10]68 Miss. 371, 8 So. 317 (1890).

*McInnis v. State*[11] and *Sanders v. State.*[12] The Court examined those authorities and concluded that in each case it had been incumbent on the State to show that there had been an unlawful conversion or appropriation *to the defendant's own use,* as it was such that the Court here held.

## Homicide

In the case of *Eaton v. State,*[13] the Court was called on to pass upon the admissibility vel non of testimony concerning certain communicated and uncommunicated threats made by the deceased against the appellant extending over a period of some days prior to the final occasion resulting in the death of the deceased at the hands of the appellant. The trial judge admitted testimony as to some threats and excluded other to the same effect, and it is the lattr action of which appellant complains.

Appellant testified that immediately prior to the shooting he said to the deceased: "Dalton, I have asked you not to stop in front of my house anymore." The deceased replied: "Well, I am here, and what in the hell are you going to do about it?" At the same time, deceased reached into the bib of his overalls for, appellant feared, a pistol. Appellant then pulled a pistol and shot deceased in what he considered necessary self-defense. This testimony therefore injected into the evidence an overt act on the part of the deceased at the time of the fatal encounter. In discussing the question, the Court said:

> Law writers discuss the admission of communicated and uncommunicated threats, admitting the former as a warning and a permit to the one threatened with attack to be on his guard; and admitting the latter in order to show the state of mind of the deceased on the issue of which party was the aggressor. In the final analysis it gets down to the ultimate question of which party was the aggressor, and this is not to be determined from the res gestae of the actual fatal encounter only. It also largely depends for correct solution upon the proof of the state of mind of the victim of the fatal encounter.

The Court quotes from *Brown v. State*[14]:

> Wherever there is doubt, confusion, dispute or conflict as to the origin of the difficulty, or as to who was the aggressor in the

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[11]97 Miss. 280, 52 So. 634 (1910).
[12]141 Miss. 289, 105 So. 523 (1925).
[13]28 So.(2d) 230 (Miss. 1946).
[14]88 Miss. 166, 40 So. 737 (1906).

> difficulty, which resulted in the death, and when such fact is the pivotal one in the case, testimony of uncommunicated threats, and the nature and character of previous difficulties, wantonly provoked by the deceased, is always admissible, *provided* the testimony shows some overt act on the part of the deceased at the time of the fatal encounter. [Italics added].

Again quoting from other authorities cited, the Court said:

> The evidence as to who was the aggressor in the fatal encounter, on the solution of which the guilt of innocence of the appellant depends, being in irreconcilable conflict, the state of mind of each of the participants therein toward the other was a material inquiry, and any evidence pertaining thereto was relevant and, unless incompetent on some other ground, should have been admitted.

In reversing the conviction in the lower court, it was here stated that while this case is not reversible on any one of the actions of the lower court, yet when taken together, the defense had been so whittled down as to result in reversible prejudicial error, the aggregate of the manifold errors denying appellant a fair trial.

In *Criss v. State,*[15] appellant appealed from a conviction of murder. He admitted killing the deceased with a shotgun, but sought justification in the imminent peril to a co-defendant, whom allegedly he was seeking to protect. He testified that the deceased told the co-defendant that he would kill him and reached for his pocket and pulled something out; that he (appellant) did not know what it was and picked up a gun and shot. Appellant's version of the shooting was contrary in many particulars to the testimony of the State's witnesses. In any event, appellant's testimony made issue of an overt act on the part of the deceased immediately prior to the fatal shooting.

Appellant filed a motion for continuance in the lower court on the basis of the absence from the State of a witness whom it was claimed could prove that on the day of the homicide, and only shortly before it occurred, the deceased made a deadly assault with a deadly weapon on appellant's co-defendant, threatened to kill, and struck and wounded the co-defendant, and would have killed him if not prevented by others. The Court here sustained the ruling of the lower court in overruling the motion and affirmed the conviction.

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[15]30 So.(2d) 613 (Miss. 1947).

> In this connection, we must consider the testimony of appellant himself, who stated repeatedly that he knew of no trouble between the deceased and Spearman. It is clear, therefore, that if there had been any threats against the latter, appellant was not aware of them, and did not take them into account in interpreting the alleged overt act of the deceased.

Compare the language of the Court here with that in *Eaton v. State, supra.*

The Court, in *Walker v. State,*[16] reaffirmed the rule that proof of a crime, distinct from the one charged, will not be allowed; but where two crimes, complete in themselves, are connected and relevant, in point of time or occasion, proof of both crimes is necessarily admissible in the prosecution for one of them in order to disclose and present a basis for comprehensive understanding by the jury. Here the appellant was placed on trial for the murder by shooting of the deceased, immediately following which he likewise shot the deceased's wife. In holding that proof of the second shooting was admissible, the Court held that:

> . . . the two crimes were inseparable components of the completed incident . . . the sequence is not material; it is their integration into the incident, interwoven with similar provocation and purpose, which makes it impractical to draw a curtain at the end of any particular act behind which the jury may not peer.

In *Crockerham v. State,*[17] among other things, the Court reaffirmed its holding of long standing that where a defendant is convicted of manslaughter on a charge of murder, he cannot complain of the giving of a murder instruction as he was not prejudiced thereby. Also, during the trial of this case, the rule had been invoked requiring witnesses to remain outside the presence and hearing of the court. The deceased's widow had already testified and thereafter was in the courtroom for awhile and heard at least a part of the defendant's testimony. Subsequently she was recalled in rebuttal for the purpose of contradicting certain parts of the testimony of the defendant. Objection was made on the ground that she had not observed the rule invoked. The trial court overruled the objection and this was assigned as a ground of error. The appellate court here holds that the admissibility of testimony under such circumstances is addressed to the sound discretion of the trial judge, and that no abuse of that discretion was found in this case.

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[16]30 So.(2d) 239 (Miss. 1947).
[17]30 So.(2d) 417 (Miss. 1947).

In *Hubbard v. State*[18] the Court was called to pass upon the question of whether a sheriff, having had reliable information of a felonious shooting at a given place on the night before, was justified in concluding that there was probable cause to believe that negroes who ran from the house on the approach of the sheriff and his posse were guilty participants in the felony of the night before, and as to whether the sheriff was therefore justified in arresting the fleeing negroes and in shooting them as they fled as a necessary means of accomplishing their arrest. The Court held that the killing of a person who is fleeing from arrest for felony is not justifiable, even when the arrest is under warrant, except when so to do is necessary; that resort to such severe means is permissible only when the arrest could not otherwise be made. A further exception was recognized in a situation under proper circumstances in cases of arrest of desperate and dangerous criminals of a vicious type. It was held that mere flight is of small probative force to be weighed only in view of the other evidence and is consistent with innocence as well as guilt.

## Rape

The case of *Barker v. State*[19] is reviewed here not because of any particular importance attached to the ground on which the case was reversed and remanded, but because therefrom the decision might be susceptible, in part, to an interpretation which it is thought was not intended by the Court.

Appellant was convicted under Section 2359, Code of 1942, which provides: "Any male person who shall have carnal knowledge of any unmarried female person of previously chaste character, younger than himself, and over twelve (12) and under eighteen (18) years of age, upon conviction, shall be punished . . ." Section 2360, Code of 1942, provides: "In the trial of all cases under the last preceding section, it shall be presumed that the female was previously of chaste character, and the burden shall be upon the defendant to show that she was not; but no person shall be convicted upon the uncorroborated testimony of the injured female."

The prosecutrix testified that she was of previous chaste character. Two witnesses testified in her behalf that her previous reputation for chastity was good, whereas the defendant introduced two witnesses who resided in the locality where she lived who testified that her previous re-

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[18]20 So.(2d) 901 (Miss. 1947).
[19]27 So.(2d) 555 (Miss. 1946).

putation for chastity was bad. The Court pointed out that the two witnesses who testified in behalf of the prosecutrix did not live in the immediate community where the prosecutrix resided, one of them living a distance of twenty and the other eight miles from the community of the residence of the prosecutrix; that the former had not lived near her within the past four years, and that the work of the latter prevented his being in that locality except infrequently. The Court reversed the conviction and remanded the cause for a new trial on the ground that the verdict was "contrary to the greater weight of the evidence on this particular issue," that is, the issue of the previous chaste character of the prosecutrix.

After quoting Section 2360, Code of 1942, the concluding phrase of which is, "but no person shall be convicted upon the uncorroborated testimony of the injured female," the decision continues with the following language: "In the instant case, the testimony of the prosecutrix was virtually uncorroborated as to her previously chaste character, . . ." From this it might possibly be said that the Court considered that the testimony of the prosecutrix as to her previously chaste character needed corroboration. This was no doubt true in the instant case on the issue of the weight of the evidence, in that two witnesses testified that her previous reputation for chastity was bad. However, it is not thought that the statutes, Sections 2359 and 2360, Code of 1942, of themselves, require corroboration of the testimony of the injured female on the issue of previously chaste character. Section 2360 establishes the presumption of previously chaste character and places the burden upon the defendant to show that the injured female was not. The concluding phrase of that section, providing that no person shall be convicted upon the uncorroborated testimony of the injured female, appears applicable, not to the preceding part of that section, but rather to the act constituting the offense itself set forth in Section 2359. It is true that where the defendant introduces proof directly impeaching chastity, or where from all the evidence it may be presumed that the female was unchaste, then it devolves upon the State to prove the whole case beyond reasonable doubt, including chastity. At the same time the question involved as to previous chastity is not one of corroboration of the testimony of the injured female, but rather one concerning the weight of the evidence, which may or may not depend on corroboration.

Sections 2359 and 2360, Code of 1942, were first enacted by the legislature as Chapter 171 of the Laws of 1914. Section 2359 is an exact copy of Section 1 of that act. Section 2 of the act remains unchanged as Section 2360, Code of 1942, except that it commences, "In the trial

of all cases under Section 1, of this Act . . ." Both of these code sections having originally been a part of the same legislative act, it would appear that the legislative intent is not subject to the construction that the question of previous chastity requires corroboration. That issue remains one of "the weight of the evidence."

### Receiving Stolen Goods

In *Pettus v. State*,[20] appellant was convicted for knowingly receiving stolen automobile tires, the evidence disclosing both direct and circumstantial proof.

Appellant complained on appeal of certain instructions granted the State. One of these told the jury that if they were "satisfied" from the facts and circumstances that the defendant received or bought the goods and converted them to his own use when he had knowledge or good reason to believe they were stolen property, then he was to be found guilty as charged. It was contended that use in the instruction of the word "satisfied" rather than the familiar and oft-used phrase of "satisfied beyond a reasonable doubt" or "believed beyond a reasonable doubt," was error. After a discussion of the definition of the word "satisfied," the Court concluded that whereas from the definition of that word the instruction could conceivably be considered meticulously correct, it is a word of too general and diffusive significance, while our familiar phrase "beyond a reasonable doubt" has a specific and concise connotation and application. The Court said that definition is simply substitution of phraseology; that "beyond a reasonable doubt" is difficult of definition, and there is no alternative, efficient substitute for "beyond a reasonable doubt." The appellate court agreed that the instruction was erroneous, but held it to be not prejudicial here, especially in view of an instruction granted the appellant which supplemented the State's instruction by supplying the missing element, "beyond every reasonable doubt."

The Court here further instructed the jury that "in considering the guilty knowledge of the defendant, they could consider the facts of their being stolen property, and the character of the goods received by him, whether they bore marks or brands indicating their ownership, and, if the property is shown to have been recently stolen, that they were of a nature that would indicate, or from which to a reasonable man would indicate, their being stolen, or if they bore marks and brands sufficient to bring to the defendant's mind the knowledge of their ownership, when received by him, then it is a presumption that the defendant had knowl-

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[20]27 So.(2d) 536 (Miss. 1946).

edge of their being stolen property." The Court held this instruction to be fatally erroneous and prejudicial, saying that it is never proper, in a case for receiving stolen goods, knowing them to have been stolen, for the jury to be instructed, in effect, that the unexplained possession alone of such recently stolen property is either a circumstance from which guilt may be inferred or that such possession is a circumstance strongly indicative of guilt which will justify, support, or warrant a verdict for the State, where such possession is unaided by other proof tending to show that the accused received such property knowing it to have been stolen. It was said that the instruction in part was a charge upon the weight of the evidence and invaded the province of the jury; that it was further bad because it was argumentative and improperly stressed particular items of the evidence. In discussing this instruction, the Court likewise announced that the word "knowing" in its relation to receiving stolen property means that if "a person has information from facts and circumstances which should convince him that property has been stolen, or which should lead a reasonable man to believe that property had been stolen, then in a legal sense he knew it."

Appellant complained of another instruction granted the State on the ground that it authorized a conviction based on circumstantial evidence, but failed to include therein the necessary element that the jury must exclude every other reasonable hypothesis than that of guilt. The Court, however, determined that from the record the evidence presented both direct testimony as well as circumstantial evidence, and announced that in such cases, as here, the instruction under uestion was proper. It is only in cases, says the Court, where the evidence is entirely circumstantial that the jury should be required to exclude every other reasonable hypothesis than guilt before a conviction can be had.

### Robbery

Section 2367, Code of 1942, allowing the death penalty for robbery by the exhibition of a deadly weapon, was the subject of scorching criticism by the Court in the cases of *Augustine v. State*[21] (two cases) and *White v. State*.[22] It seems appropriate herein to quote at length from these decisions:

> . . . the case does not, in fact, present exaggerating elements calling for such extreme penalty. . . . This is a very harsh law, . . . where the penalty is death and yet there is no personal injury of any kind to anyone, and, as a matter of fact, under the circumstances of this case, no real likelihood of personal

[21]28 So.(2d) 243 (Miss. 1946); 29 So.(2d) 454 (Miss. 1947).
[22]25 So.(2d) 650 (Miss. 1947).

injury. . . . If the other two [there were two others participating in the crime with the defendant] are given the extreme penalty, which, by comparison with the guilt of appellant, ought to be done, then the State has exacted the lives of three persons for a robbery where no one was injured personally, and there was, under the circumstances little likelihood of personal injury.

We have searched the record in vain for some ground on which to reverse the conviction. We use the expression "searched," because we have felt it our duty to reverse the case if we could find grounds for so doing. Infliction of the death penalty under the facts of this case constitutes, as a matter of fact although not as a question of law, cruel and inhuman treatment. The jury had the power to inflict that penalty, and we cannot disturb that action unless the record discloses some other error justifying us in so doing. This is a Court of review. Our power is limited in this case to passing upon errors disclosed by such review. We have no power to pardon offenses or commute sentences.

And, again, after reviewing the trend away from death penalties from 1800 on in England, the United States and Mississippi;

In response to the familiar argument that one who exhibits a deadly weapon when committing a robbery will probably use it if necessary for the accomplishment of his purpose, a sufficient answer should be that the law does not permit this penalty to be inflicted on one who, intending to commit murder, inflicts a wound with a deadly weapon on his intended victim . . ., but which, contrary to the intention of the would-be murderer, turns out to be insufficient to produce death.

I hope that I shall live long enough to see this blot on our criminal law—this evidence that something of the savage still lingers in us—erased by the Legislature repealing this statute.

## II

## DOMESTIC RELATIONS

*Hugh N. Clayton**

A review of the decisions of the Mississippi Supreme Court in the Domestic Relations field concerns twelve cases. The topical arrangement used follows that of *Amis on Divorce & Separation in Mississippi.*

### A. Proof of Marriage Relation

The right of the widow of a deceased soldier to inherit certain realty from him, as against the claim of brothers and sisters of the deceased,

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was involved in the case of *Harkins v. Cole*.[1] It was alleged that the wife was estopped to assert her claim due to an alleged second marriage prior to the death of her first husband and the doctrine of estoppel was conceded by the widow if she had, in fact, married the second time, which fact she denied. Over the objection of the widow, a certificate of the circuit clerk of an adjoining county was introduced in evidence wherein he recited what, in his opinion, the marriage records of his office disclosed relative to the alleged second marriage.

It was held by the Court that the fact of a marriage could not be proved in this manner, citing Section 1734 of the Mississippi Code of 1942. The Court stated: "It, therefore, appears from this statute that the only way in which proof of the celebration of a marriage can be made in our courts is by either introducing the record thereof, or the original certificate of marriage, signed by the person performing the ceremony, or by a certified copy of the record of the marriage duly signed under the seal of the Circuit Clerk."[2]

### B. Domicile

The law relative to domicile in domestic relations cases is reiterated in *Lucia v. Lucia*.[3] The decision of the chancellor refusing to grant a divorce was reversed because of inconsistencies and discrepancies within the evidence relative to what constitutes an actual bona fide residence within this state. It was held by the Court that there must be "actual residence voluntarily established within the State, with bona fide intention of remaining here, if not permanently at least indefinitely; and that a domicile, once established, continues until another is acquired, and cannot be considered lost or changed until a new one is acquired by removal to a new locality with the intent to remain there, as stated above, and to abandon the old without intent to return thereto."[4]

### C. Proof of Adultery

In the case of *Oberlin v. Oberlin*[5] it is stated that the fact of adultery may be shown by either proof or admissions on the part of the guilty spouse. There was no direct proof of unlawful cohabitation by the husband in this case but there were certain admissions made in the record as to the alleged cohabitation which were held sufficient to sustain the allegation of adultery.

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[1] 28 So.(2d) 839 (Miss. 1947).
[2] *Id.* at 840.
[3] 27 So.(2d) 774 (Miss. 1946).
[4] *Id.* at 775.
[5] 29 So.(2d) 82.

### D. Doctrine of Recrimination

This doctrine is expounded and elaborated in the case of *Oberlin v. Oberlin*.[6] The husband filed suit for divorce on the ground of desertion. The wife denied that she was guilty of desertion and in a cross bill, by way of recrimination, set up alleged adultery on the part of the husband. It was decided by the Court that the plea of adultery, by way of recrimination, was well pled and it is believed that a portion of the opinion should be set out verbatim. It is in the following language: "The rationale of the doctrine of recrimination is not its defensive efficacy against a complainant's charge but searches at once the status of the complainant as a litigant. The State, whose judicial servants administer its laws, is an interested party to the marriage contract, and one who comes into its courts complaining of a mote in the eye of his spouse must beware lest there appear a disfiguring beam in his town. His own hands must be clean. Banks v. Banks, 118 Miss. 783, 79 So. 841; Dunn v. Dunn, supra; Joy v. Miles, 190 Miss. 255, 199 So. 771; Chavez v. Chavez, 39 N.M. 480, 50 P.(2d) 264, annotated in 101 A.L.R. 635, 646; 17 Am. Jur. Divorce and Separation, Sec. 233, 236; 27 C.J.S., Divorce, §67, p. 623. Our conviction upon the soundness of this principle does not yield to appellee's insistence upon a liberal and practical view which would contemplate with tolerant eye the plight of one who in his quest for recaption of lost matrimonial dreams, had quitted the beaten paths of legal sanction, and had sought merely to assuage pangs of frustration with the consolatory tonic of forbidden fruits."[7]

### E. Laches in Divorce Cases

The doctrine of laches or staleness is recognized in divorce suits and is announced in the case of *Stanley v. Stanley*.[8] The first wife of the deceased, George Stanley, sought to attack the legality of a divorce decree secured by Stanley in 1894, and to thereby have declared null and void his second marriage with the resultant bastardizing of the eight children of Stanley born of the second marriage. George Stanley died in 1944, and it was not until after his death that this suit was filed in an attempt to assert the alleged rights of the first wife in the estate of George Stanley. The defenses of estoppel and laches were raised against the first wife. The Court did not pass on estoppel but sustained the plea of laches on the equity maxims "He who seeks equity must do equity," "He who comes into equity must come with clean hands," and "The laws serve the vigilant, and not those who sleep over their rights."

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[6] 29 So.(2d) 82.
[7] *Id.* at 83.
[8] 29 So.(2d) 641 (Miss. 1947).

Applying these maxims to the facts in the case, the Court was of the opinion that the defense of laches was well taken. During the period of time of approximately 50 years, the lapse between the date of the alleged fraudulent divorce and the date suit was filed by the first wife, the attorneys and judge who participated in the divorce case in 1894 had died; George Stanley had remarried and was the father of eight children. During all this period of time the first wife had lived in the same community with George Stanley and could have investigated the facts in 1894 as well as in 1944. The Court stated that the doctrine of laches has constantly grown in favor among the courts of this country, is well established and is clearly recognized in Mississippi. In sustaining the defense of laches, the Court held that to permit the first wife to attempt to invalidate the divorce in 1894 would place a stigma upon the name of Stanley's second wife and bastardize the eight children of the second marriage and concluded that the first wife was guilty of inexcusable laches in bringing a suit to set aside a divorce decree of 1894.

### F. Custody and Support of Children

The dominant and natural right of the parent to the custody and care of his child is set forth in rather elaborate language in *Reynolds et al. v. Davidow*.[9] The appeal is from a habaes corpus proceeding and involves the contest of the parents over twin children. The opinion announces that the parent has a natural right to the custody of his child and that the principle of what is best for the child does not come into play until the misconduct of the parent is such that he forfeits and abandons his rights. It is only when the parent has become unfit to have the custody of the child that the State may enter into the picture and determine the custody of the child according to its welfare. It is well to notice the vivid language with which these two principles are enunciated: "In the kaleidoscope of human relationships, the rude and realistic hand of fate jostles the facts and their actors into ever changing patterns, and through its lens the courts view constant rearrangements into designs which never repeat. There is only one constant. This is the dominant and natural right of the parent to the custody and care of the child. So long as this right is not forfeited by conduct or conditions which adversely affect the welfare of the child, mere considerations of comparative well-being are no concern of the state whose continuing guardianship of its infant wards may supervise but never supersede its natural guardian.

[9] 27 So.(2d) 691 (Miss. 1946).

"It is not exact to say that the controlling principle is the mere welfare of the child for the law does and must recognize that its welfare is presumed to be best promoted by parental custody. Against this presumption, the pressure of mere assertion that the material advantages of a better culture or a more lavish provision are elsewhere available may not prevail. To say that the parent has the right to rear his child in decent poverty is but to acknowledge that the right to share the lot of those of whom the child is part is more fundamental than the measure of the lot itself. As this right becomes impaired by conduct or conditions which strip off the fabric of which this presumption is fashioned, the State has the duty to assume the responsibilities which the parent has discarded. It is then that the welfare of the child emerges as an important factor. The State in compelling parental solicitude must be never lax in manifesting its own. Yet it withholds its own powers until the parent abandons the child or by unfitness abandons his rights."[10]

This right of the parent to the custody of the child is extended in *Conrad v. Fountain,*[11] to a reformed mother. The custody of the children was awarded to the father due to the unfitness of the wife at the time the parties were divorced. The mother remarried, completely reformed from the babit of drunkenness, and no word of disparagement was made against her home with her second husband. The father to whom the children were awarded at the time of the divorce was permanently hospitalized and the children were placed in the immediate care of a grandmother.

In the contest over the right of the reformed mother to custody, the father maintained that it was too great a risk to conclude that her recent period of sobriety would be permanent. The Court was of the opinion there was no definite yardstick by which this probability could be definitely calculated but that, since the mother had regained sobriety following the divorce decree, the probabilities were that she would continue such virtues in order to enjoy the companionship of her children which was awarded to her by the Court.

Quite often, fathers who have been charged with the support and maintenance of children whose custody has been awarded to the mother, refuse to continue contributions when such visitation as is permitted them under the Court decree is denied improperly by the mother. Such a

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[10]*Id.*
[11]30 So.(2d) 803 (Miss. 1947).

situation presented itself in the case of *Lide v. Lide*.[12] To a citation for contempt for his failure to make such payments, the father pled in defense the refusal of the mother to let him visit his child in accordance with the court decree. The Court held that it was the duty of the father to support his minor child in accordance with the divorce decree and that he is not relieved therefrom because of any misconduct of the child's mother, observing that the court has the power to render such new decrees as may be proper under such changed conditions which are brought to the attention of the court. Of course, the rationale of such a decision is the welfare of the child. The child should not be made to suffer because of the improper failure of either the mother or the father to comply with the decree awarding custody and providing for visitation and support and maintenance.

### G. Alimony

The award of a lump sum, decreed as alimony by the chancellor, was modified on appeal by the Supreme Court to cover possible contingencies in the case of *Aldridge v. Aldridge*.[13] The Court approved an award of lump sums as alimony as such but, in view of the provisions of Section 2743 of the Mississippi Code of 1942, chose to make the award more elastic to guard against certain contingencies. The Court modified the lump sum award, taking into consideration it said, the possibility of important and controlling changes in the status of the parties. The opinion of the Court is in these words: "In the absence of an existing emergency or of evidence that there is involved a division of property accumulated by joint labor or investment, the station of both parties calls for an award which takes due notice of the duty owed to the wife by the husband, and the duty owed the husband by the law. In retrospect, a substantial lump sum allowance could later be seen as unjust to the husband if the needs of the wife should be terminated by her early death or remarriage. See Guess v. Smith, 100 Miss. 457, 56 So. 166, Ann. Cas. 1914A, 300. On the other hand, injustice could later be found to have been done a needy wife whose allowance of a bare monthly subsistence was too soon cut off by the death of the husband." Proceeding on this theory, the lump sum of $7,500.00 was made payable over a period of years with quarterly installments of $500.00 until the total sum was paid. The Court seemed to feel that the modification of a lump sum awarded by the chancellor was a fine thing, observing, "Such readjustment compels the ready endorsement of both justice and wisdom, from which only one susceptible

[12] 30 So.(2d) 51 (Miss. 1947).
[13] 27 So.(2d) 884 (Miss. 1946).

to an impulse toward immediate and improvident dissipation would dissent."[14]

Where a divorce decree awarded the sum of $250.00 "by way of present alimony" payable $50.00 per month, it was held in the case of *Cazenave v. Cazenave*[15] that such a provision was temporary and not permanent. Therefore, the petition of the wife for additional allotment some months subsequent to the former decree was authorized under Section 2743 of the Mississippi Code of 1942 which gave the court continuing jurisdiction for this and other purposes.

### H. Contempt

What constitutes a prima facie case of contempt of court is illustrated in the case of *Vogel v. Vogel.*[16] The decision of the chancellor adjudging the husband to be in contempt and ordering him committed to jail until he should have purged himself by paying the installments then in arrears was approved by the Court. The Court enforced the rule that his failure to comply with the decree providing for support and maintenance placed him prima facie in contempt and placed upon him the burden of proving his inability to make the payments as directed. Concluding that he had not met this burden, the Court affirmed the decision of the chancellor committing him to jail.

A citation for contempt of the Supreme Court was directed to issue in *Chiarani v. Rutherford.*[17] The appellant was the unsuccessful party in a habeas corpus proceeding involving the custody of a child and while her appeal was pending in the Supreme Court, she kidnapped the child. On motion of the appellee, the appeal was dismissed and a citation for contempt issued for appellant. The ultimate outcome of the citation, of course, does not appear in the decision reported. One can easily imagine that the appellant likely is beyond the territorial limits of the State of Mississippi.

While not strictly a contempt proceeding, the appeal of the appellant in *Creel v. Creel*[18] was dismissed on motion for failure to comply with an order of the Supreme Court for solicitors' fees and alimony pendente lite. Appellee moved for the dismissal of the appeal, showing non-compliance on the part of the appellant, which motion was sustained, with judgment against the appellant and the sureties on his appeal bond for such solicitors' fees and accrued temporary alimony.

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[14] *Id.* at 885.
[15] 28 So.(2d) 856 (Miss. 1947).
[16] 28 So.(2d) 217 (Miss. 1946).
[17] 29 So.(2d) 255 (Miss. 1947).
[18] 29 So.(2d) 838 (Miss. 1947).

# III

# INSURANCE

*George T. McClintock**

## Subrogation

In the case of *Chandler v. State Farm Mutual Automobile Insurance Company*[1] there was involved the question of subrogation under an automobile collision policy. The insurance policy contained a subrogation clause as follows:

> "In the event of any payment under this policy the Company shall be subrogated to all the insured's rights of recovery therefore and the insured shall execute all papers required and shall do everything that may be necessary to secure such rights."

After the accident happened a claim against the Missouri Pacific Railroad for the death of Mr. Chandler and damages to the automobile was settled by filing a complaint in the Circuit Court of Pulaski County, Arkansas, and entering a judgment which recited that judgment "be entered of record as a full, satisfied and discharged judgment, and that the defendant be and he is hereby discharged, of all further liability herein."

In a suit by the administratrix of the estate to recover against the insurance company under the policy, the Court held that when the insured without consent of the insurance company released the railroad company from liability for damages to the automobile it thereby destroyed the rights of the insurance company against the railroad contrary to the provisions of the policy, and that the insurance company was thereby released from liability to the insured. The insurance company was not a party to this arrangement and did not consent to it. The Court said that the duties of the insurance company to pay losses on its policy carries the corresponding duty on the part of the insured to subrogate its rights to the insurer.

## Burial Insurance

In *Mississippi Ben. Ass'n. v. Majure,*[2] a burial insurance policy was involved. The policy contained a clause to the effect that upon

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[1]28 So.(2d) 571 (Miss. 1946).

[2]29 So.(2d) 110 (Miss. 1946).

receipt of the notice of the death of any one of the persons named residing together as one family, it would furnish a funeral at a cost not to exceed $150.00. Among those listed was Nyles Majure, who was 20 years old and unmarried at the time of his death while in the country of Holland in active combat as a soldier of the United States. The two questions involved in the case were: (1) whether or not Majure was residing together as a member of the family mentioned in the policy at the time of his death; and, (2) whether or not the phrase "removal to another state" limited the policy to be in a state of the United States. The policy contained a provision to the effect that should the insured remove to another state and should the association be not represented there, the contract becomes a cash policy in lieu of the funeral expenses. The Court held that insurance policies are to be construed strongly against the insurer, but that the construction must be a reasonable one; that the young man who was drafted into the Army at a time when he was living with his mother and other members of his family was "removed" from the State of Mississippi at the time of his death from enemy action in Holland; and that therefore the policy would become a cash policy in lieu of funeral expenses. The Court also held that where the mother continued to pay the premiums and her son's name was never stricken from the policy, the son was considered as residing together as a member of the family within the coverage of the policy. The Court said that his induction into the Army by the draft did not change his legal status in his relationship with his family.

### Double Indemnity

The case of *Equitable Life Assurance Soc. of United States, et al. v. Mitchell*[3] involved an action to recover double indemnity under a life policy which provided that the double indemnity provisions were not applicable where insured's death resulted from commission of an assault by the insured. The evidence showed that the accident occurred because the insured struck the driver of the car in the face. The plaintiff introduced evidence to the effect that the cause of the accident was not in violation of law by the insured, but the result of a flat tire on the automobile. The Court in reversing judgment below for the plaintiffs stated that the evidence as to the flat tire causing the accident was mere conjecture or possibility, and that the verdict of the jury could not stand upon a scientilla of evidence, reannouncing that the scientilla of evidence rule is not recognized in Mississippi, and that in such a situation it is the Court's duty to grant a peremptory instruction.

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[3]29 So.(2d) 88 (Miss. 1946).

# IV

# PLEADING, PRACTICE AND PROCEDURE

*Ed. H. Green**

## Limitation of Actions

In the case of *Dyer v. Lowe*[1] a contract was entered into acknowledging the existence of a previous debt. There were uncertainties and inconsistencies as to the dates of execution and maturities of the notes, and the portion of the debt referred to as the salary account would require an expert accountant to reconcile the debits and credits. The Court held that this acknowledgment would take the claim from under the bar of the statute of limitations; that the uncertainties as to the exact amounts could be explained, and were not sufficient to impair the identification of the debt.

In the suggestion of error in the case of *Jones v. Crawford*[2] it was urged on the Court that the sale by a guardian in 1927 of a minor's interest in real estate was for a grossly inadequate consideration. There was a conflict in the testimony on this point, and the Court was unable to say that the finding of the chancellor was erroneous. The Court further grounded its decision upon the doctrine of equitable estoppel. In 1941 one of the appellees moved on the property and thereafter expended large sums of money for improvements; this was done with the full knowledge of the appellants who were then of legal age. The Court held that when they stood silently by throughout more than three years and allowed the holder of the record title to make these improvements, the doctrine of equitable estoppel would apply.

In the case of *Stone v. McKay Plumbing Company*,[3] the taxpayer obtained a judgment in the lower court for the recovery of sales tax paid on labor and material that went into heating plants and plumbing work. The State tax Commissioner appealed, and thereafter the Legislature amended Section 10122 of the Code of 1942, placing limitations on the statute by providing that plaintiff must allege and prove that he alone bore the burden of the tax, and that suits must be filed within three years instead of six years after payment. The question presented to the Court was the effect of a subsequent act of the Legislature on a judgment. In the original opinion the Court held that the state's consent to be sued

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[1]29 So.(2d) 324 (Miss. 1947).

[2]30 So.(2d) 513 (Miss. 1947).

[3]26 So.(2d) 349 (Miss. 1946), *sugg. error overr.*, 30 So.(2d) 91 (Miss. 1947).

is not a contract, and may be modified or repealed even though pending suits are defeated; that this rule applies to judgments if appeals are pending at the time of the enactment of the new statute. On suggestion of error the Court was equally divided, the suggestion of error was sustained, and the judgment of the lower Court affirmed. In a well-reasoned opinion the Court predicated its holding upon the proposition that a valid judgment against the state becomes a vested right, and that such right based upon a statute that authorized the state to be sued cannot be taken away by the repeal or modification of the statute.

### Juvenile Court

In two very interesting cases questions involving the interpretation of our juvenile statutes were presented to the Court. In *Lewis v. State*[4] the attorney general raised the question of the constitutionality of Sections 7204-7206 of the Code of 1942, in that these sections placed a limitation on the circuit court to proceed in a criminal case. The Court failed to pass on this question, but stated that this was a capital case, and these statutes did not apply to capital cases, thereby indicating that the sections would be unconstitutional if applied in a capital case.

In *McGinnis v. State*[5] the constitutional question was again raised. The Court again failed to pass squarely on this question, but made the observation that section 7204 of the Code of 1942 did not ipso facto deprive the circuit court of jurisdiction in felony cases since it was not mandatory and hence not necessarily unconstitutional. The Legislature in 1946 repealed these sections of the Code and passed the Youth Court Act.[6] In Section 15 thereof it is provided that if a child thirteen years of age or older is charged with an offense that would be a felony if committed by an adult, the court (Youth Court) after full investigation may in its discretion retain jurisdiction and proceed with the case as a delinquency case or certify such child for proper criminal proceedings to any court which would have jurisdiction of such offense if committed by an adult, except that the circuit court shall have exclusive jurisdiction of such child if he be charged with any crime which upon conviction is punishable by life imprisonment or death. Section 156 of the Constitution gives the court full jurisdiction over crimes and misdemeanors, and neither the jurisdiction of the circuit court, nor its power to exercise it, can be abridged. It is difficult to see how the Court can fail to declare the portion of this Act unconstitutional that attempts to place a limitation on the constitutional jurisdiction of the circuit court.

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[4]28 So.(2d) 122 (Miss. 1946).
[5]29 So.(2d) 109 (Miss. 1947).
[6]Miss. Laws 1946, c. 207.

### Transfer of Causes

In the case of *Reed v. Charping*[7] the bill of complaint sought not only damages but also other relief which was clearly equitable. However, the chancellor sustained a general demurrer and a motion to transfer the cause to the circuit court, and allowed an appeal. The appellee attacked the right of appeal because of Section 147 of the Constitution. The answer to this contention could have been found, with citation of authority, in Judge Griffith's *Chancery Practice*: ". . . it is to be particularly noted that the section covers a case only where the trial judge *assumes* jurisdiction. If therefore the chancellor sustain a demurrer on the ground of no equity and *decline* jurisdiction when in fact the case was one good in equity his action is reviewable exactly as if the section did not exist."[8] However, in reversing and remanding the case to the chancery court, the Court based its right of review on the broader ground that the action of the chancellor here was not merely a mistake as to jurisdiction, but that it further amounted to a "denial of substantial rights." Though the opinion suggests that this may be considered an exception to Section 147, it is probably more accurate to say that Section 147 is not even applicable. It forbids reversal where the sole ground of appeal is error as to jurisdiction, and was certainly not intended to be applied to cases where there has been denial of substantial right.

### Pleadings

In the case of *Reedy v. Alexander*[9] appellants filed a petition in which answer under oath was not waived, praying that certain personal property be set aside as part of the assets of the decedent; the appellee filed a sworn answer in which there was set up affirmative matter to sustain her claim to a portion of the personal property. At the conclusion of the testimony the appellee moved the court to exclude and enter a decree dismissing the petiiton, which motion was sustaind. Under this state of facts the Court held that the burden was on the appellee as to the affirmative matter, and the chancellor was not justified in considering the appellee's sworn answer as conclusive proof of its averments; that the affirmative averments in the answer were not evidence, but must be proven. This is a restatement of the rule as laid down in Griffith's *Chancery Practice* cited in the opinion.

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[7] 29 So.(2d) 271 (Miss. 1947).
[8] Griffith, Chancery Practice (1925) § 512.
[9] 30 So.(2d) 599 (Miss. 1947).

A bill of complaint was filed by the appellee in *Woodward v. Moss*[10] praying for the cancellation of an alleged claim as a cloud on his title. He did not deraign title, but proceeded on the theory that title was derived from a common source; this allegation was indefinite, and he did not allege that he had a better title from the common source. The Court held that the failure to make the allegations clear and certain could not be supplied by testimony. In the opinion, it is pointed out that since the exact character of defendant's claim is unknown to him, he should have deraigned his title from the government.

In the case of *In re Mey's Estate*[11] it was held that the question of the alteration of a will, even if apparent, must be raised by plea and not by demurrer.

In the case of *Crosby v. Keen*[12] the appellee brought suit on a promissory note. Appellant pleaded the general issue, and gave notice of a set off, alleging that a partnership composed of appellee and another owed him a sum of money. Appellee failed to file a plea verified by oath traversing this notice as required by Section 1751 of the Code of 1942. Appellant instead of relying on the statute introduced testimony of the partnership; thereupon appellee over objections introduced testimony in rebuttal to the effect that there was no partnership. The Court held that the testimony in rebuttal was competent because appellant first injected testimony of the partnership into the case. In the state of the pleadings the appellee could not deny that a partnership existed; but when appellant introduced testimony to establish the partnership, the appellee was permitted to introduce testimony to overcome the testimony introduced by appellant. The Court justifies the admission of appellee's testimony denying the partnership as being "evidence admissible by reason of admission of similar evidence by the adverse party." Wigmore calls this "curative admissibility," and in his treatise on Evidence[13] he sets out the definite split of authority—some courts holding that such rebutting evidence is always admissible, others that it never is, and the third group taking an intermediate position. In the instant opinion our Court seems to adopt the third view, which Wigmore also seems to favor and which he states thus: ". . . the opponent may reply with similar evidence *whenever it is needed for removing an unfair prejudice which might otherwise have ensued from the original*

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[10]30 So.(2d) 420 (Miss. 1947).
[11]28 So.(2d) 125 (Miss. 1946).
[12]28 So.(2d) 322 (Miss. 1946).
[13]1 WIGMORE, EVIDENCE (3d ed. 1940) 304-309.

*evidence, but in no other case.*"[14] It is difficult to see how the original evidence in this case caused any prejudice, since it was merely corroborative of a fact already established by the pleadings; at most it could be called irrelevant. Our Court evidently regards Section 1751 as a strict rule of pleading, that must be strictly construed against the party who invokes it; that when appellant introduced testimony as to the partnership he thereby manifested his willingness to make the partnership vel non an issue and waived his rights under the statute.

### Cross Bills

In the case of *Hudson v. Gulf Refining Company*[15] defendants made their answers cross bills praying confirmation of title, and in addition to denials of the contents of the original bill they set out sufficient allegations of title in themselves by adverse possession. Complainants then filed motion to dismiss the original bill without prejudice, which was resisted by defendants. The trial court overruled the motion, held a hearing on the cross bills, from which hearing the complainants, cross-defendants, absented themselves, and gave a decree in favor of cross-complainants. On appeal the Court held, first, that the trial court was correct in hearing the cross bills on their merits. The rule was reaffirmed, as set out in Section 384 of Griffith's *Chancery Practice,* that dismissal of an original bill does not of necessity carry with it dismissal of the cross bill; if the cross bill seeks affirmative equitable relief and sets out sufficient facts in justification thereof, then it should be retained and tried independently of the original bill. Secondly, it was held that since the issue and facts involved in the cross bills were identical with those of the original bill, the whole matter is now res adjudicata and the controversy over dismissal of the original bill is a moot question. In this decision there is an excellent discussion of cross bills and their province.

### Process

In the case of *Burns v. Allen,*[16] an ejectment suit, appellee secured judgment by default; the summons was served personally on the appellant, but the process did not comply with Section 791 of the Code of 1942 in that it failed to inform the defendant of the nature of the action. The Court held that the statutory requirements for the service of process in ejectment cases must be strictly followed. This case is

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[14] *Id.* at 307.
[15] 30 So.(2d) 66 (Miss. 1947).
[16] 31 So.(2d) 125 (Miss. 1947).

distinguished from other actions where resort to the declaration or bill is the source of information as to the nature of the suit.

In *Johnson v. State*[17] the Court held that an undated search warrant was void, and could not be amended by the trial court, and evidence obtained thereunder is not admissible.

### Witnesses

In the case of *Adams v. State*[18] two very interesting questions were decided by the Court. The district attorney appeared before a justice of the peace and obtained a search warrant for the search of the home of the appellant for intoxicating liquors. Armed with the search warrant and a copy thereof, the district attorney and a deputy sheriff made the search. The deputy sheriff never served the copy but laid it on a table. The district attorney retained the original search warrant and after the search he saw the appellant reading the copy. On the trial of the case the district attorney was offered as a witness and testified over the objections of the appellant. The Court held, first, that the district attorney is not a peace officer, and that he cannot assume the role of a detective or perform the duties of the sheriff. Second, that it was reversible error for the district attorney to testify in a criminal case, unless such testimony is made necessary by the circumstances that may develop in the case; that if he knows before the trial that he is a necessary wintess he should recuse himself, and the court should appoint a district attorney pro tempore.

In the case of *Hitt v. State*[19] the county attorney testified as to a confession. The objection was made that the county attorney was a judicial officer, and that he had failed to warn the defendant that any statements made could be used against him. The Court held that the county attorney was not a judicial officer, and the testimony was competent. The question of the county attorney taking part in the prosecution and also testifying was not raised. In view of the *Adams* case above, the prohibition against a county attorney testifying in a case in which he is participating will apply with equal force.

In the case of *Wheat v. State*[20] the appellant, a public official, had been summoned to testify before a legislative investigating committee concerning his duties, his salary, and other facts concerning his office.

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[17] 31 So.(2d) 127 (Miss. 1947).
[18] 30 So.(2d) 593 (Miss. 1947).
[19] 182 Miss. 184, 181 So. 331 (1938).
[20] 30 So.(2d) 84 (Miss. 1947).

Later he was indicted for embezzling the funds of this same office. The Court held that the testimony before the committee gave him statutory immunity from the subsequent indictment. It was reasoned that the quesions asked him constituted "links" in the entire prosecution, even though none of the questions or answers before the committee tended in any way to incriminate him. In a dissent, Judge Alexander expressed the view that there should be no immunity unless the testimony before the committee in some way pointed toward guilt or was there linked up with the principal fact under investigation.

## Jury

In the case of *Parker v. State*[21] on motion of the appellant a special venire of ninety persons was drawn; seventy-four of these were summoned, the others not being found. Of the seventy-four summoned, the trial judge excused twenty-six before the case was called for trial. These jurors were excused for business reasons, sickness or because they were disqualified. When the case was called for trial, the appellant moved the court that the jury panel be quashed, and that a venire facias be drawn on a resetting of the case. This motion was overruled. Thereupon the appellant moved that thirty additional jurors be drawn "to replace those excused without the consent of the defendant"; this motion was also overruled, but at a later date after the spcial venire had been exhausted, and two of the jurors on the regular panel had been excused, the thirty additional jurors were drawn and summoned. In affirming the case the Court stated that there was no intimation of actual fraud, and that the facts and circumstances did not show any legal fraud on the rights of the appellant; that the trial judge would not have been in error in accepting in open court the excuses given by the jurors. A very strong dissenting opinion was rendered by Judge L. A. Smith, and concurred in by Judge Griffith. It was pointed out in this opinion that the right to a special venire is granted to a defendant in a capital case in order that proper investigation of the veniremen summoned might be made, thereby enabling his attorney to wisely exercise his rights as to challenges; that this departure from the statutes as to a substantial number of the jurors placed the defendant at a distinct disadvantage in the selection of the jury.

The substantial rights of litigants are best preserved where trial judges adhere as closely as possible to the provisions of the jury statutes, and deviation therefrom should be carefully avoided. When a person summoned on a special venire presents a legitimate excuse to a

[21]29 So.(2d) 910 (Miss. 1947).

trial judge in chambers it is the better policy to obtain the consent of the attorneys before he is excused.

In the case of *Pepper v. State*[22] after both sides had rested, but before the arguments were begun, one of the jurors separated from the jury and held a private conversation with a person from another county, who was not a member of the jury. In affirming the case, the Court stated that there was no reason for the trial judge to suspect that improper influence had been used; that the mere possibility that such influence might have been used was not sufficient to set aside the conviction. In a well reasoned dissenting opinion Judge L. A. Smith draws the distinction between the former holdings of our Court wherein the conduct of the juror was clarified and exonerated by proof, and the above case where there was an unexplained private conversation between a juror and an outside person that presented an opportunity for undue influence.

### Arguments

In the case of *Herrin v. State*[23] motion for a mistrial was made because of the prejudicial remarks of the district attorney in the closing argument. In affirming the case, the Court said, "we are of the opinion that while the remarks of the district attorney constituted an appeal to race prejudice, and should not have been made, the action of the trial judge in promptly sustaining an objection thereto was sufficient to prevent his overruling of the motion for a mistrial from constituting a reversible error, under all the facts and circumstances of this case."[24]

It is very difficult to say when, if ever, an appeal to racial prejudice is eradicated from the minds of a jury. Our Court has repeatedly admonished prosecuting attorneys to desist from such types of argument. In reversing the case of *Hardaway v. State*[25] because of the prejudicial argument of the district attorney, the Court said, "race prejudice has no place in the jury box, and trials tainted by appeals thereto cannot be said to be fair and impartial." The case of *Hampton v. State*[26] was reversed because an appeal to racial prejudice was made by the district attorney. Judge Calhoun speaking for the court said, "Mulattoes, negroes, Malays, whites, millionaires, paupers, princes and kings, in the courts of Mississippi, are on precisely the same equal footing. All must be tried on facts, and not on abuse. Only impartial trials can

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[22]27 So.(2d) 842 (Miss. 1946).
[23]29 So.(2d) 452 (Miss. 1947).
[24]*Id.* at 454.
[25]99 Miss. 223, 54 So. 833 (1911).
[26]88 Miss. 257, 40 So. 545 (1906).

pass the Red Sea of this Court without drowning. Trials are to vindicate innocence or ascertain guilt, and are not to be vehicles of denunciation."[27]

A very interesting question was decided in the case of *Brown v. State*.[28] The county prosecuting attorney commented of the failure of the appellant to introduce his brother as a witness. In affirming the case the Court drew the distinction between a witness who is physically accessible to both parties and one who is available to both parties. The Court held that the brother of the appellant was not equally available as a witness for the State because of his kinship to the defendant, and therefore the failure to place him on the stand was a proper subject of comment. This decision represents a change in the Mississippi law, and is in accord with the modern trend. It is worthy of note that the reasoning in this decision is very similar to that in the excellent article on Evidence appearing in a recent issue of the *Journal,* in which a case following the old doctrine was severely criticized.[29]

### Insanity

In *Ratcliff v. State*[30] a motion for a new trial set up that the appellant was insane at the time of the slaying and further that he was insane at the time of the trial and unable to assist his attorneys therein; and that these facts only came to their attention when the trial was almost completed. The trial court heard evidence on behalf of both the accused and the state, and overruled the motion. The Court held that the overwhelming weight of the testimony supported this action, and it was affirmed. In commenting on the case the Court reaffirmed the rule announced in *Carter v. State*[31] that if the trial judge observes any mental aberrations displayed by the defendant which might prevent him from conducting a rational defense, then the trial should not be proceeded with until that question had been investigated. The Court also denied the contention of the appellant that a writ of lunacy should have been granted. When a person is under indictment and being prosecuted in the circuit court he is under the exclusive jurisdiction of that court, which jurisdiction the chancery court cannot invade.

In the case of *Wilson v. State*[32] on cross examination of a witness for the State it was developed that the appellant had never been "bright,

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[27]*Id.* at 259, 40 So. 545, 546.
[28]27 So.(2d) 838 (Miss. 1946).
[29]Fox, *The Work of the Mississippi Supreme Court, 1942-1946—Evidence* (1946) 18 Miss.L.J. 24, 37.
[30]29 So.(2d) 321 (Miss. 1947).
[31]198 Miss. 523, 21 So.(2d) 404 (1945).
[32]30 So.(2d) 62 (Miss. 1947).

and had funny ways, crazy like," but there was no testimony that he could not distinguish between right and wrong as to the particular act. The Court held that this testimony was not sufficient to raise the issue of insanity; that a defendant may be shown to be eccentric, passionate and excitable, but that this is not insanity within the meaning of the law, the true test being his ability to distinguish between right and wrong as to the particular act.

### Appeal and Error

In the case of *California Company v. State Oil and Gas Board*[33] the very interesting question of the right of an appeal from the administrative board was presented to the Court. An exception was granted to one of the appellees to the general rule and regulation for the spacing of oil wells, the appellant having been made a party to the application. The Court held that the statute authorized an appeal to the circuit court from the granting of an exception in the same manner as an appeal is allowed by any party affected by a rule or regulation of the State Oil and Gas Board.

The Court further held that the case could not be heard de novo in the circuit court, as that court was without constitutional power to substitute its findings for that of the board: that the only power conferred on the court was to determine whether or not the board in its orders acted within the authority conferred on it by statute, and in making such orders, whether or not it did so upon facts substantially sufficient to sustain its action.

In *State Oil and Gas Board v. Superior Oil Company*[34] the appellee filed a petition requesting a public hearing and praying that the order regulating the spacing in the Gwinville field be modified. A hearing was had as provided by law, and the board refused to revoke or modify its order; thereupon appellee filed a second petition more than ten days after the entering of the order, in which it was stated that appellee had nothing new to offer, and that the real object was to obtain a rehearing of the first petition on the same record. The Court held that the allowance of an appeal was limited to ten days from the date of the order in the original petition, and that no appeal having been taken therefrom, it was not subject to judicial review. The Court called attention to the statement in the case of *California Company v. State Oil and Gas Board, supra,* in which it was said: "Most assuredly, the statute does not contemplate that two hearings shall be had upon the same issue between the same parties, and on the same evidence."

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[33]27 So.(2d) 542 (Miss. 1946).
[34]30 So.(2d) 589 (Miss. 1947).

# V

# PUBLIC LAW AND TAXATION

*Sam V. Pack**

The Court's decisions which may be grouped generally under the subjects of Public Law and Taxation include several which are of considerable importance to the Bar generally.

## Public Law

In *Hawkins v. City of West Point*[1] the Court reached the novel conclusion that where the minutes of a city council recite that a previous order was made, it must be presumed that the previous order mentioned was in fact made, though no such previous order appears on the minutes. The attack was collateral for the purpose of confirming a city tax title. Said the Court, "To preserve the integrity of the rule [that a municipality's minutes import verify], it must be presumed in the light of the quoted recitals of the minutes of May 20, 1931, that the previous order therein mentioned was in fact made but that by some inadvertence it failed to be recorded. The order having been made, it was not jurisdictional [to the validity of the tax sale] that it be actually entered on the minutes, the jurisdictional elements thence being that due notice shall be given and that on the day fixed by the order and notice the governing authorities shall be present and shall hear all objections, and this the minutes show was done."[2]

*Evans v. City of Jackson*[3] concerns the validity of a quitclaim deed executed by the City of Jackson under a former administration. Its validity was challenged by the present administration—prodded, it would seem, by meticulous title attorneys. At a municipal tax sale the land had been struck off to the city. After the redemption period expired, the city had conveyed it by quitclaim deed to the former owner. No precedent order or resolution authorizing the sale to the former owner had been entered. No advertisement of the proposed sale to the former owner had been made. However, after execution of the deed the city commission passed an order ratifying the sale. The present administration assailed the sale to the former owner for the reasons, *inter alia*, that such sale could have been made only on "order or resolution" previously rendered and that "every resolution or order" was required

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[1]27 So.(2d) 549 (Miss. 1946).
[2]*Id.* at 550.
[3]30 So.(2d) 315 (Miss. 1947).

to be published.[4] The Court held, by statutory interpretation, that publication of the order authorizing the sale was not required, and that, since the city could have authorized the sale in the first place, it had authority to validate the sale by an order of ratification after the sale was made.

In *Board of Supervisors of Tishimingo County v. Blissitt,*[5] the Court for the first time in its history construed the meaning of the word "interested" in Section 8314, Mississippi Code of 1942, which provides the procedure whereby a board of supervisors may change a public road upon the signed petition of "ten or more freeholders or householders of the county interested in the road." The proposed roadway was to shorten the distance from the community called Salem to Midway. The petition was signed by five householders living on the road in question, and by more than five others who did not live on the road but lived in the Salem community. The board's order changing the road was attacked on the ground, among others, that those signers who did not live on the road were not "interested" within the meaning of the statute. The Court rejected this reasoning, holding that the word was intended in a popular and not a technical sense, and that these householders living in Salem community who would gain half a mile by a new road going to church, to school, to the neighborhood grocery, and to the county seat, were interested in that road and were proper signers of the petition therefor.

The Corrupt Practices Act was held, in *Chinn v. Cousins,*[6] to make mandatory the initialing of a ballot by the initialing manager. Compliance with this provision of the act was declared to be essential and indispensable to the legality of the ballot. All ballots which had not been initialed were thrown out. A special election was ordered for the one precinct in which none of the ballots had been initialed.

Authority of the town of Hickory to zone out the sale of beer within 1500 feet of any church or school was upheld in *Fanning v. Town of Hickory*[7].

In *Corso v. City of Biloxi,*[8] the Court held that Sections 61 and 71 of the Constitution of 1890 were not violated by the Legislature in the enactment of Chapter 269 of Laws of 1946, which provided that "all of

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[4]Miss. Code Ann. (1942) §§ 3756, 3806.
[5]27 So.(2d) 678 (Miss. 1946).
[6]27 So.(2d) 882 (Miss. 1946).
[7]30 So.(2d) 65 (Miss. 1947).
[8]29 So.(2d) 638 (Miss. 1947), *sug. error overr.,* 30 So.(2d) 237 (Miss. 1947).

the general provisions of Chapter 137, Laws of 1944, shall apply to and are hereby adopted as the means by which the provisions of this law may be enforced, and the tax and penalties imposed may be collected." The Court held that Chapter 269, Laws of 1946, did not undertake to revive or amend Chapter 137, Laws of 1944, by reference only. It held that the effect of the quoted provision was substantially the same as though it had read that the provisions of the Act of 1946 may be enforced and the tax collected "in the manner now provided by law."

### Taxation

Exemption of non-producing oil, gas, and mineral leases and rights from ad valorem taxes and the mineral documentary stamp tax were assailed as unconstitutional in *Mississippi Power & Light Co. v. Love.*[9] The Court held that the exemption was not violative of the constitution. It pretermitted the question of the validity of the documentary stamp tax.

As to the pretermitted question the dissenting opinion of Judge Roberds is enlightening. If the documentary stamp phase of the act is attacked in a proper proceeding, the arguments of the dissenting justice may well form the principle basis for attack.

A less novel tax exemption, that of cemeteries, was considered in *Evans v. City of Jackson.*[10] The Court upheld the chancellor's finding of fact that the platted parcel of land, which was sold for nonpayment of ad valorem taxes, had not been used for burial purposes exclusively and was therefore liable to taxation. As to the few graves in the parcel the Court held that they were exempt from taxation. Interesting complications could have arisen. But the Court was spared from them (and the observer deprived of them) by the fortunate fact that the tax sale purchaser will use the entire parcel for cemetery purposes in the future, and the chancellor set this out in his decree. Not uninteresting, however, is the Court's announcement that by its tax patent and tax purchase of the platted parcel, the purchaser acquired also all rights of ingress and egrees, approaches, alleys, and ways abutting the parcel. They were shown on the plat and the Court reasoned that a plat is "in a manner a muniment of title."[11]

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[9]27 So.(2d) 850 (Miss. 1946).
[10]28 So.(2d) 249 (Miss. 1946).
[11]*Id.* at 252.

In *Craig v. Dun & Bradstreet, Inc.*[12] the Court held that a credit-reporting agency which has obtained a state-wide privilege license is not subject to a municipal privilege license tax attempted to be imposed by the municipality wherein its office is located.

The owner of a warehouse who merely stores therein his own merchandise is not liable for the payment of a privilege license tax under Section 196, Chapter 137, Laws of 1944, which imposes such tax "on each person operating a warehouse." *Coats, City Tax Collector v. L. B. Price Mercantile Co.*[13] The Court held that the act, despite its somewhat awkward wording, applies only to public warehouses.

In *Mississippi Power Co. v. City of Laurel,*[14] the State Tax Commission is said to have the exclusive right to assess an office building, garage, and steam plant of an inter-county public utility, notwithstanding that such property is situated wholly within one county. Though such property has a fixed situs, it is merely an integral part of the entire system.

In *Prudential Insurance Company of America v. Barnett, Auditor,*[15] our Court anticipated correctly that the Supreme Court of the United States would uphold the constitutionality of the McCarran-Ferguson Act when construed as authority for the continuance by states of discriminatory taxation of non-resident insurance companies. Under Section 9537, Mississippi Code of 1942, appellant was required to pay an annual privilege or premium tax equal to two and one-fourth per cent of the gross premiums received on insurance policies written or covering risks in this state. Local insurance companies are required to pay a tax of only one-half that amount, against which the amount of their ad valorem taxes may be credited. The tax against appellant was admittedly unequal and discriminatory. In holding that Section 9537 violates neither federal nor state constitutions, the Court applied familiar rules of constitutional law. Inequality and discrimination do not alone invalidate state regulation of interstate commerce. Such discriminatory regulation must be unduly or unreasonably burdensome. Regarding the McCarran-Ferguson Act, our Court observed that it was passed by Congress to cushion the shock resulting from the decision of the United States Supreme Court in *United States v. Southeastern Underwriters Association,*[16] whereby "the insurance business was suddenly snatched

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[12]30 So.(2d) 798 (Miss. 1947).
[13]30 So.(2d) 75 (Miss. 1947).
[14]28 So.(2d) 750 (Miss. 1947).
[15]27 So.(2d) 60 (Miss. 1946).
[16]322 U.S. 533 (1944).

from state custody, confined within the commerce clause and subjected to the rigorous domination of the Sherman Act."[17] The McCarran-Ferguson Act was held constitutionally to promote the general welfare by vouchsafing to the states a period of armistice within which to make an orderly withdrawal from the field which the United States Supreme Court had unexpectedly taken from them.

Taxation of a foreign corporation was also the question presented in *Stone, Chairman of Tax Commission v. Memphis Natural Gas Company.*[18] The Tax Commission had demanded of appellee the payment of the corporation franchise tax imposed under Sections 9312-9340, Missisippi Code of 1942. Appellee, a pipe-line company, was engaged in interstate commerce exclusively; however, about one hundred miles of its line ran through the northwestern part of this state. The validity of the franchise tax was attacked upon the ground that it was a burdensome interference with interstate commerce. The Court held that the appellee was liable for the franchise tax for the reason that its local activities were substantial, the amount of the tax was in reasonable proportion to the services and protection which the state furnishes appellee, and such tax did not amount to enough to have substantial effect to block or impede the free flow of interstate commerce.

The corporate veil was pircd by the Court for tax purposes in *Hewgley v. Stone, State Tax Commissioner.*[19] A corporation engaged in the business of producing oil and gas was dissolved and its stockholders received their proportionate undivided interests. As individuals they continued the operation of the business through an agent. The question was whether or not the undivided share in the assets of the dissolved foreign corporation which was assigned to a non-resident stockholder constituted a "liquidating dividend." The Court held that it did not.

*Slush v. Patterson*[20] demonstrates the degree of proof which is necessary to overcome the presumption that the tax collector properly and regularly performed his duty in the conduct of a tax sale. The question was whether several tracts were sold separately or as a unit. If sold as a unit, the sale was invalid. No oral testimony regarding the point was adduced. All the tracts were listed on one unpaid tax receipt and the aggregate taxes were computed on the total value of all

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[17] 27 So.(2d) 60, 65 (Miss. 1946).
[18] 29 So.(2d) 268 (Miss. 1947).
[19] 27 So.(2d) 693 (Miss. 1946).
[20] 28 So.(2d) 738 (Miss. 1947).

the land. In ordering the land sold on a date not fixed by law, the board of supervisors entered an order which seemed to indicate that all tracts were treated as a unit. Notice of the tax collector's sale grouped all tracts under the name of the owner and put the values, the county tax, the state tax, and the damages all on one line. The list of lands sold to the state showed the same situation with reference to taxes and damages, the total of these items being calculated on the aggregate of all the tracts as a unit. Though it was not outside the realm of possibility that the sheriff might have actually sold the tracts separately, the Court found this evidence sufficient to rebut the presumption of regularity.

In *State* ex rel. *McCullen, State Land Commissioner v. Sproles,*[21] the Court protected bona fide purchasers against the land commissioner's attempt to set aside a tax sale on the ground that the land was state-owned at the time of the sale—that the patent whereby the state had previously divested itself of title was void for the patentee's nonpayment of the purchase price. The records of the land office and of the state treasurer failed to show that the patentee had paid the purchase price. The Court was careful to restrict the scope of this decision to the particular situation of appellees.

October tax sales were again held void in *Hooper v. Walker,*[22] wherein the Court followed the rule previously laid down in *Jackson v. Webster,*[23] and other decisions. The rule that the two-year statute of limitations provided in Chapter 196, Laws of 1934, did not come into operation until the possession of the owner was disturbed by the patentee was extended to embrace tax sales made subsequent to the passage of the act, as well as to those sales made prior thereto.

In overruling a suggestion of error which was filed to the decision in *Stern v. Parker,*[24] the Court tersely reiterated the views therein expressed in its decision reported in 27 So.(2d) 402 (Miss., 1946). In 1902 a separate estate had been created in oil, gas, and minerals. It was never separately assesssed, and in 1937 the land, described by a valid surface description, was sold for taxes and not redeemed. The Court held that the tax sale passed the separately-owned mineral interest.

In *Harlan v. Martin*[25] there was reiterated a prior holding to the effect that where the order of the board of supervisors definitely fixed

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[21]28 So.(2d) 218 (Miss. 1947).
[22]29 So.(2d) 72 (Miss. 1947).
[23]196 Miss. 778, 18 So.(2d) 298 (1944).
[24]25 So.(2d) 787 (Miss. 1946).
[25]27 So.(2d) 725 (Miss. 1946).

the date for the sale of tax-delinquent land and recited that no sales of lands had been made for delinquent taxes thereon at the regular time fixed by law, it was unnecessary that the land be described in the order.

Purchase of the rights of a tax sale purchaser prior to the expiration of the redemption period did not constitute a redemption of the property where the purchase price, though directed to be paid to the chancery clerk for account of the grantor, was not paid to him until after the expiration of the redemption period.[26]

*Smith v. Myrick*[27] announced no new rule of law, but may be noted as an instance in which the Court reversed the finding of a chancellor on an issue of fact because there was no evidence to support the lower court's finding that a tax patentee had commenced exercising possession more than two years prior to the institution of the suit.

## VI

## TORTS

*Stovall Lowrey**

In the field of Torts there have been about twenty-five cases decided by our Supreme Court during the 1946-47 session which are deserving of mention. Cases decided per curiam or without sufficient discussion in the opinion to make them of value as precedents have, of course, been omitted. Eight cases fall under the classification of "Automobiles." Seven cases are classified as "Master and Servant" cases. At least two of the cases which have been classified as "Automobile" cases involve questions of "Master and Servant" and at least two of the "Master and Servant" cases involve questions arising out of the operation of automobiles, but the classifications have been made with special attention to the points involved which appear to have controlled the decisions. There are two cases classified under "Railroads" and one case classified under the head of "Master and Servant" in which a railroad is defendant. There are two "False Imprisonment" cases, both against sheriffs of counties. Three other negligence cases concern, (1) the negligence of a doctor in treating the patient, (2) the negligence of a property owner in connection with the collapse of a party wall, and (3) the negligence of a restaurateur in serving a customer. These last mentioned three

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[26]Bounds v. Brown, 29 So.(2d) 657 (Miss. 1947).
[27]29 So.(2d) 924 (Miss. 1947).

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cases, together with three others to be mentioned hereinafter, are classified as "Miscellaneous."

### Automobiles

The case of *Trewolla vs. Garrett*[1] concerned an automobile, owned by the plaintiff, which was damaged by collision with the automobile of the defendant, Garrett. The evidence was undisputed that the defendant approached a paved highway from a side road and came to a stop, while the ambulance was proceeding along the highway and approaching the intersection. A coating of ice and snow on the windshield of defendant's automobile prevented him from seeing the approaching ambulance. After stopping he again started the car and drove into the highway and into the side of the ambulance.

The jury rendered a verdict for $50.00 upon undisputable proof that the ambulance had been damaged to the extent of $163.72. The plaintiff appealed. The defendant contended that the plaintiff was guilty of contributory negligence and defendant was granted an instruction on the alleged contributory negligence of the plaintiff.

The appellate court reversed the judgment and rendered judgment for the appellant in the amount sued for, on the basis that there was no evidence of negligence on the part of the plaintiff; that although, according to the testimony, the plaintiff may not have seen the defendant's automobile, he would have been entitled to assume, if he had seen it, that it would remain stopped until he could pass.

In *Murphy v. Burney*[2] the suit grew out of a collision between the automobiles of the plaintiff and the defendant but the facts are not set forth in the opinion.

The judgment was for the plaintiff and the defendant appealed, assigning as errors the giving of certain instructions for the plaintiff which defendant complained took no account of the possibility that the plaintiff may have been guilty of contributory negligence. But on the trial neither party asked for instructions upon contributory or comparative negligence.

It was held that where neither side requested instructions upon contributory or comparative negligence it was not error to grant an instruction authorizing recovery of full damages if the jury found that the damage resulted proximately from the negligence of the defendant.

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[1]27 So.(2d) 887 (Miss. 1946).
[2]27 So.(2d) 773 (Miss. 1946).

The case also involved the question of whether it was error to refuse to allow a witness to testify regarding the general reputation of plaintiff's driver as reckless. It was held that the trial courts' refusal to allow the testimony was proper since the issue of his negligence on the particular occasion may not be resolved by proof of general reputation; that the trait of recklessness was not a point directly in issue.

Judgment for the plaintiff was affirmed, the Court saying that under the facts of the record the issues of negligence and liability were for the jury.

A similar case is that of *Trotter et al. v. Staggers, et al.*[3] in which Staggers sued Trotter for damages to his truck, alleging negligence, and the jury found for Staggers. Trotter appealed, assigning as error the refusal of the trial court to grant him a peremptory instruction.

The plaintiff's truck backed out into the street from a private driveway early in the morning while it was yet dark and while it was raining. The defendant's truck was proceeding along the street and the two trucks collided. The defendant claims that the collision was due to the negligence of the plaintiff in backing into the street, to insufficient lights, etc. Again the defendant requested no contributory negligence instruction and since the evidence was conflicting and would have supported a verdict either way the Court declined to disturb the finding of the jury.

Another point involved was a motion for a new trial upon newly discovered evidence. It appeared from the affidavit supporting such motion that the additional witnesses would merely have given cumulative evidence. The Court held that newly discovered evidence which is merely cumulative or which simply tends to impeach witnesses is not ground for a new trial.

In *Baird v. Harrington*[4] the plaintiff, on a motorcycle proceeding along a through paved highway, was struck by a truck being driven by a servant of the defendant and entering the highway from a plantation road. Judgment was rendered for the plaintiff in the sum of $7500.00. The medical fees alone were $4000.00. The negligence of the defendant was based upon Section 8197 of the Code of 1942 which provides that the driver of a vehicle shall stop at the entrance to a through highway and shall yield the right-of-way to vehicles which are approaching so closely as to constitute an immediate hazard.

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[3]28 So.(2d) 237 (Miss. 1946).
[4]30 So.(2d) 82 (Miss. 1947).

In this case the defendant asked for and obtained instructions to mitigate the damages in proportion to the extent the negligence of the plaintiff contributed to the accident. The Court comments that "it is clear that the jury followed this instruction in arriving at the amount of the judgment appealed from because if the jury had not found the plaintiff was guilty of negligence a verdict in a much larger amount would have been justified."[5] The case was affirmed.

The plaintiff in *Western Union Tel. Co. v. Perry*[6] drove her car into a telegraph pole, which was located off the paved portion of the street about three feet, and off the right-of-way for the street about one foot. The street upon which plaintiff was traveling paralleled the railroad track, and she testified that she was blinded by the lights of two cars parked at the depot.

The decision depends on whether the location of the pole was improper under Section 7838, Code of 1942, which provides that telegraph companies may set up posts and fixtures along the public streets and highways "but the same shall be constructed and placed so as not to be dangerous to persons or property." After reviewing the several decisions in this State regarding location of the poles of telegraph and power companies the Court decided that the pole was not located so as to be dangerous but that the sole proximate cause of the accident was the negligence of plaintiff in driving deliberately off the pavement while blinded by the lights of the parked cars.

The Court held that the defendant's motion for a peremptory instruction at the conclusion of the testimony should have been granted. The case was reversed and judgment rendered for the defendant.

In *Ross v. West*[7] the plaintiff, Phyllis M. West, a child thirteen years old, sued by next friend to recover damages for permanent personal injuries received when she was struck by defendant's taxicab after alighting from a street bus in Biloxi and proceeding across in front of the standing bus and into the path of the taxicab. The taxicab was proceeding about twenty-five miles an hour, and there was evidence that it failed to reduce its speed or otherwise exercise caution for pedestrians.

The question was as to the duty of the driver of an automobile in passing a street bus which has stopped to discharge passengers. Sec-

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[5] *Id.*
[6] 27 So.(2d) 688 (Miss. 1946).
[7] 30 So.(2d) 310 (Miss. 1947).

tion 8205-B of the Code of 1942 recites that "the driver of any vehicle, when permitted to overtake and pass upon the left of a street car which has stopped for the purpose of receiving or discharging any passenger shall reduce speed and may proceed only upon exercising due caution for pedestrians . . ." The opinion of the Court discusses the general rule as set forth in the text books on automobile law and states the rule as follows:

"It is our judgment then that the rule is to be stated substantially as follows: When a street bus has stopped at a street intersection or at any regularly designated point for the purpose of receiving or discharging any passenger, a motorist who passes it must anticipate the likelihood that some person in leaving the bus or hastening to reach it may place himself or herself within the path of the passing vehicle, in view of which the speed of the latter must be so controlled and otherwise such due caution must be taken by the driver thereof as that injury to the person or persons mentioned shall be avoided if reasonably it may be done by the exercise of the required precautions."[8]

This is another case where the contributory negligence of the plaintiff appears to have been taken into consideration by the jury in fixing the damages after instructions were granted the defendant regarding comparative negligence.

The plaintiff's husband, in *Saxton v. Rose et al.*,[9] was killed in a wreck of a truck driven by the defendant, Eldridge, and owned by the defendant, Rose. Saxton was riding with Eldridge as a guest.

The plaintiff alleged and proved that the driver of the truck was in a state of intoxication that rendered him incompetent to safely operate the truck. The judgment was for the defendants, and the plaintiff appealed.

The case turns upon a question of assumption of risk. A distinction is drawn between contributory negligence and assumption of risk. The Supreme Court affirmed the case, holding that the plaintiff's husband, having voluntarily and knowingly placed himself in a truck beside a driver so intoxicated as to be wholly incapable of driving the truck, thereby assumed the risk and was not merely contributorily negligent.

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[8] *Id.* at 311.
[9] 29 So.(2d) 646 (Miss. 1947).

*Kramer Service, Inc. v. Robinson*[10] was an action originally against Tri-State Transit Company and its bus driver, Pat Havens, and against Kramer Service, Incorporated and its truck driver, W. O. Martin, to recover damages for the death of one Robinson. It was alleged that Robinson's automobile crashed head on with the Tri-State bus after the bus had pulled into the left lane of the highway to avoid crashing into the rear of the Kramer truck, which had suddenly and without warning decreased its speed.

During the trial the plaintiff took a nonsuit as to the defendant Tri-State Transit Company, having reached a settlement with that defendant. The jury returned a verdict in favor of the defendants, Havens and Martin, but found against Kramer Service, Incorporated, in the sum of $19,500.00 from which verdict and judgment Kramer appealed.

The defense was based upon undisputed proof that Martin, the alleged truck driver, had no authority to be at the place where the collision occurred in the discharge of any duty as employee of Kramer; that if he were present and involved in the accident he was not about Kramer's business and had no right, authority or duty to be there as a representative of Kramer. The judgment was reversed and judgment rendered for the appellant, the well established rule being reaffirmed that where the driver was not acting in the scope of his employment the owner of the vehicle could not be held liable for the driver's negligence.

### Master and Servant

*Gulf M. & O. R. Co. v. Joiner*[11] was a suit under the Federal Employer's Liability Act for the wrongful death of the plaintiff's husband, it being alleged that the injury and resulting death of Joiner was due to the negligence of Joiner's fellow employee, Hairston. The deceased was a section foreman and his fellow employee, Hairston, was assistant foreman. Together with other members of the section crew they were riding on a railroad motor car and trailer, Hairston being the operator of the motor car and Joiner being on the back end and in charge of the crew and the operation. At an intersection with a highway a log truck collided with the motor car and Joiner was killed.

The theory of the plaintiff's law suit was that the collision occurred through the negligence of the deceased's fellow servant, Hairston, such negligence being actionable under the federal statute. Plaintiff al-

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[10]29 So.(2d) 456 (Miss. 1947).
[11]29 So.(2d) 823 (Miss. 1947).

leged that Hairston was negligent in failing to stop the motor car before reaching the grade crossing when he saw, or should have seen, the truck approaching. There was evidence that Joiner signaled Hairston to go ahead and a scintilla of evidence that Joiner signaled Hairston to stop. The Court observes that a mere scintilla of evidence does not justify submitting the case to the jury. The weight of the evidence under the Federal Employer's Liability Act must be more than a scintilla before the case may be properly left to the discretion of the triers of fact.

The decision of the appellate court rests, however, upon a point of law regarding the right of way or the right to proceed at intersections. After observing that the railroad motor car entered the intersection first and that, according to the driver of the log truck, there was plenty of time for the truck to stop, the Court held that the negligence of the driver of the log truck in failing to stop was the sole proximate cause of the collision and a judgment rendered in the trial court for the plaintiff was reversed and judgment entered for the defendant.

The plaintiff in *Masonite Corp., et al v. Stevens*,[12] a truck driver for defendant, was seriously injured when struck by the metal rim of a truck wheel while trying to remove a tire from defendant's truck without sufficiently deflating it.

Plaintiff charged that defendant failed to furnish him a safe place to work and safe tools and appliances. The evidence was not sufficient to establish these allegations but the point upon which the case turned was whether or not there was a duty on either the defendant corporation or its foreman, Ponder, to warn the servant, Stevens, of the danger involved in removing the tire without deflating it. The plaintiff had been a truck driver in the army and had been assistant truck driver for the defendant corporation before being promoted to truck driver. The Court held that the operation of removing a tire was not sufficiently complex to require rules to be promulgated; further, that the employer was entitled to assume that the driver knew his job and that he was aware of the danger of undertaking to change the tire without deflating it. Accordingly, the judgment for the plaintiff was reversed and judgment rendered for the defendant.

*Hercules Powder Co. v. Thompson*[13] was a suit for injuries received when a loose floor board of the defendant's truck bounced up while the truck was traveling over rough country and caused an ax which

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[12]30 So.(2d) 77 (Miss. 1947).
[13]29 So.(2d) 823 (Miss. 1947).

was lying on the floor board to strike and injure the plaintiff's ankle. It appeared from the evidence that the foreman knew of the condition of the truck and that the ax was carried in it. The foreman also knew that the truck had to travel over rough country; that it would bounce in the manner described.

The question was whether or not the accident and injury was a foreseeable one. A question arose upon the instructions granted plaintiff as to whether the plaintiff's theory was one of "a safe place to work" or one of "safe tools and appliances." The Court said that it was harmless error for an instruction to be given regarding a safe place to work when the real issue was dangerous machinery with which to work, and judgment for the plaintiff was affirmed.

The plaintiff in *Walley et al. v. Williams*[14] sued for injuries received when he was filling a tractor tank with gasoline from an open bucket and the gasoline ignited and severely burned him.

The judgment for the plaintiff in the trial court was reversed and the case remanded for another trial because the question of liability insurance was injected into the trial by a juror. The Supreme Court vigorously reaffirmed the rule of *Odom vs. Walker*,[15] that it is error to inject into the evidence the fact that the defendant has liability insurance. A juror asked to be permitted to question the witness and when granted the permission the juror asked the witness about whether or not he was paying insurance. The witness answered, "The Company paid - - -" and was stopped by objection being sustained. The Court goes even further than the previous rule and says that the juror who asked the question about insurance showed by so doing that he was not a qualified juror.

There is dicta in this opinion with reference to the rule that where a safe method is at hand to perform a task and an employee deliberately uses an unsafe method, known by him to be unsafe, the employee cannot hold the employer liable for the results.

In *Masonite Corp. v. Scruggs*[16] the plaintiff was an employee of defendant corporation on a job where it was necessary for him to handle boards which had been dipped in water. He charged that carbolic acid in the water caused a breaking out and soreness of his hands.

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[14]28 So.(2d) 579 (Miss. 1947).
[15]193 Miss. 862, 11 So.(2d) 452 (1943).
[16]29 So.(2d) 262 (Miss. 1947).

On appeal it was held that the proof failed to show that the chemical existed in harmful quantities or that the condition of his hands was caused by chemical in the water, and that the trial court should have granted defendant's motion for a peremptory instruction.

In *Hercules Powder Co. v. Palmer*[17] the plaintiff was injured by flying debris when a pine stump was blown to pieces with dynamite. Plaintiff was an employee of defendant and immediately prior to the explosion which caused these injuries was sitting under the steering wheel of a truck which he was employed to drive and within the danger zone. The proof was undisputed that the foreman and others gave warning of the explosion just before the charge was set off and there was a question of fact as to whether or not the plaintiff heard or understood the warning and, further, as to whether or not the warning was given a sufficient length of time before the explosion to permit the plaintiff to reach a place of safety.

It is held that an employer engaged in dynamiting tree stumps had a duty to use reasonable care to see to it that employees both heard and understood warnings in due time that the dynamite fuse had been lit, so that the employees could reach a place of reasonable safety. Since there were disputed questions of fact in this regard the Court declined to disturb the finding of the jury.

The plaintiff sued for injury suffered by her while employed at the defendant's factory in *Blue Bell Globe Manufacturing Co. v. Lewis*.[18] Plaintiff alleged that after having had an operation for hernia in 1939, believing herself cured, she applied for work with the defendant in 1942; that the company doctor examined her and pronounced her physically fit for the job; that she was put to work lifting heavy bundles and suffered a recurrence of the rupture.

The theory of the case is that the plaintiff was ignorant of her condition; that the defendant knew through its examining physician that she was not able to do the work but failed to disclose that fact to the plaintiff. It was charged that the defendant was negligent in permitting the plaintiff to lift heavy bundles under these circumstances. The evidence supported plaintiff's contention that she was threatened with discharge from employment if she failed to perform the work required of her.

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[17]30 So.(2d) 804 (Miss. 1947).
[18]27 So.(2d) 900 (Miss. 1946).

The defense made on the trial was largely that the plaintiff assumed the risk of her employment. Section 1456 of the Mississippi Code of 1942 provides that in actions for personal injuries to employees, such employees shall not be held to have assumed the risk of employment where injuries result from the negligence of the employer. It is held in this case that the negligence of the defendant in permitting the employee to do heavy work in full knowledge through its doctor of the probable result amounted to negligence in the purview of this Statute.

Judgment for the plaintiff in the trial court was affirmed.

### Railroads

In *Taylor v. I. C. R. Co.*[19] suit was brought by the brother and sister of a man who was found dead by the side of the railroad track early in the morning after having been seen alive in an intoxicated condition about 11:00 o'clock of the night before. The physical facts indicated that he had been struck by a southbound train about 3:10 a.m., it being evident that his body was carried southward from the first point of contact and there having been only this one southbound train during the time mentioned. The engineer and train crew testified that their head lights were in good condition; that they were keeping a proper look out, and that they did not see the man who was killed and knew nothing of the accident until a day later. The plaintiffs contended that under Section 1741 of the Mississippi Code of 1942 and under the authority of a previous case, *Railroad Co. v. Harrison,*[20] the case should have been submitted to the jury upon the proof that an injury was inflicted by the running of a locomotive engine, etc., since the cited section provided that such proof makes a prima facie case.

Following the decision in *Meridian Light and Railroad Company v. Dennis,*[21] the Court held that when all of the facts surrounding the accident are shown the prima facie result disappears and that the burden was upon the plaintiffs to prove negligence. The Court held that no negligence was shown and that the peremptory instruction given by the defendant was correctly granted and the case was affirmed. No doubt this decision was influenced by the fact that the deceased was shown to have been intoxicated.

The decision in the case of *Gulf M. & O. R. Co. v. Scarborough*[22] rests upon the same grounds as the decision in the case of *Taylor v. I. C.*

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[19]27 So.(2d) 894 (Miss. 1946).
[20]105 Miss. 18, 61 So. 655 (1913).
[21]136 Miss. 100, 100 So. 581 (1924).
[22]28 So.(2d) 849 (Miss. 1947).

*R. Co., supra.* The plaintiff sued for the value of two animals alleged to have been killed by the negligent running of the train and the prima facie statute was relied upon to take the case to the jury. The jury found for the plaintiff and upon appeal the judgment was reversed and judgment rendered for the defendant. The Court held that the evidence was without contradiction that there was no negligence on the part of the train crew, and dismissed the matter with the comment that the case was controlled by the Taylor case and that the peremptory instruction requested by the defendant ought to have been given.

### False Imprisonment

*Sheffield v. Reece, Sheriff*[23] involved the arrest of plaintiff Sheffield by the sheriff for the offense, committed in the sheriff's presence, of being drunk in a public place. Sheffield was detained in jail from Saturday until Monday notwithstanding a good bond tendered by his father on Sunday morning. Plaintiff asked an instruction that it is a sheriff's duty to release on bond within a reasonable time one whom the sheriff has arrested without a warrant for being drunk in a public place. This instruction was refused and plaintiff assigned the refusal to grant such instruction as error.

The legal question involved was whether the sheriff has any statutory authority in such case to fix and accept a bail bond for accused's appearance at a proper time and place for a hearing, since it is conceded under *Jacquemine v. State*[24] that the sheriff had no authority at common law to fix and approve bail bonds. The reasoning of the Court was to this effect:

1) Section 29, Constitution of 1890 provides that such person is entitled to bail.

2) Section 1834, Code of 1942 authorizes an officer to release on bond one whom he holds on a warrant charging an offense of which the justice of the peace has final jurisdiction.

3) Section 2470, Code of 1942 authorizes a sheriff to arrest without a warrant a man who commits an indictable offense in his presence.

4) Hence authority to accept a bond must be implied in this statute, otherwise the man could be held in violation of his constitutional right to bail.

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[23]28 So.(2d) 745 (Miss. 1947).
[24]48 Miss. 280 (1873).

A second case involving the question of false imprisonment is that of *State, for the use of Floyd v. McCrory, Sheriff.*[25] In that case the sheriff was sued on his official bond for damages for false imprisonment of an eleven year old child. The sheriff had a warrant for the arrest of the child's mother for assault and battery with intent to kill. When he arrested the mother the child was put in jail with her, but according to the sheriff's testimony it was in accordance with the wishes of both the mother and the child that the child be permitted to remain in the custody of the mother rather than left with the grandfather who offered to care for the child.

The plaintiff asked for a peremptory instruction which was refused. The jury found for the defendant. There was considerable conflict in the testimony, but if the facts were as related by the sheriff—and the jury was entitled to believe the sheriff's version—then there was no liability for false imprisonment because there was no imprisonment of the child.

### Miscellaneous

In *Sartin v. Blackwell*[26] the plaintiff, Mrs. Blackwell, sued Sartin to recover for injuries sustained when she swallowed a piece of broken glass contained in drinking water served her with a meal in defendant's restaurant. The trial court granted an instruction to find for plaintiff if the jury believed she swallowed glass on the occasion and under the circumstances set forth "which was in or on said glass of water".

The defendant objected to the instruction because it made him liable regardless of the question of negligence.

The Court discusses distinctions between cases based upon negligence and cases based upon implied warranty, and holds that the doctrine of implied warranty obtains with reference to food served in a restaurant, and further with reference to the freedom of the tableware from deleterious substances. It is held that the liability of a restaurateur to a patron for injuries sustained by the patron swallowing broken glass contained in water served to the patron is not restricted to that for negligence and liability may be predicated upon a breach of implied warranty.

Two concurring special opinions decline to base the decision on implied warranty solely, but hold that evidence of broken glass in the water makes a prima facie case on the neglignce thory.

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[25]27 So.(2d) 365 (Miss. 1946).
[26]28 So.(2d) 222 (Miss. 1946).

An attempt to invoke the doctrine of res ipsa loquitur arose in *Sanders et ux v. Smith,*[27] a suit by the parents of Evelyn Sanders, a ten year old child, who died in the Taborian Hospital at Mound Bayou following an operation for removal of her tonsils.

The only witness was the mother of the child. She testified that the child was put to bed about 11:00 o'clock a. m., taken to the operating room and returned to her bed in her room about 1:00 o'clock, with nurses and doctors accompanying her. The mother was told the child was all right and directed to go eat her lunch, which she did—returning because of uneasiness in about twenty minutes. She found the child in obviously abnormal condition, and summoned the doctor, who administered oxygen without favorable results. The child was pronounced dead.

Plaintiffs relied on the doctrine of res ipsa loquitur, saying:

"It is a matter of common knowledge that death does not ordinarily result from a tonsillectomy. Yet the child died! Why? Neither of the parties know. Her parents are entitled to an explanation."[28]

The trial court granted a peremptory instruction to the defendant and this action was the only error assigned by appellants. The Supreme Court held, however, that res ipsa loquitur will not supply both the proximate cause and the inference of negligence. The doctrine is put into operation by the showing of the proximate cause.

The negligence of a property owner in connection with the collapse of a party wall was involved in the case of *Bloch v. Brown.*[29] The wall of an ancient building in Vicksburg collapsed, falling upon the adjacent building in which the plaintiff, Bloch, conducted a merchandising business as a tenant. The plaintiff sued Brown, owner of the building which collapsed, for damages, alleging negligence in construction and maintenance of the wall and relying upon the doctrine of res ipsa loquitur. The defendant undertook to show that there was a mysterious explosion near a chimney built into the wall. He also defended upon the grounds that the plaintiff's landlord had joint responsibility with defendant for maintenance of the party wall which collapsed; but this latter plea failed for the reason that there was no privity of plaintiff with his landlord in respect of maintenance of the property.

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[27]27 So.(2d) 889 (Miss. 1946).
[28]*Id.* at 891.
[29]29 So.(2d) 665 (Miss. 1947).

The evidence regarding the explosion was submitted to the jury under an instruction that the jury should find for the defendant if the explosion in the party wall caused the collapse. This instruction was held to be erroneous since the explosion did not exonerate the defendant unless it occurred without fault of the defendant and was the sole cause of the collapse. The decision in the case turned upon the instruction with reference to the doctrine of res ipsa loquitur and the burden of proof placed upon the defendant by the application of this doctrine. The appellate court said that the rules of liability for negligence are not changed by the doctrine of res ipsa liquitur. The plaintiff had the initial burden of preponderant proof but after proof that the party wall waivered, crumbled and collapsed the burden was placed on the defendant to make some explanation, and the proof of the collapse of the wall was sufficient to withstand the defendant's motion to exclude the plaintiff's evidence.

The discussion of the proper framing of instructions in regard to these matters is too hair-splitting to admit of much comment in a concise report such as we are undertaking to make here.

In *Summers v. Kirkland,*[30] several complainants filed a bill together in chancery court to enjoin the maintenance of a nuisance and for damages. The complainants alleged that a large pile of sawdust at the defendant's hoe works had accumulated and that constant deposits of sawdust by action of the wind were being made in the homes of the complainants nearby. Before trial of the case the nuisance was voluntarily abated by the defendant. When the defendant moved the sawdust pile the remedy by injunction was eliminated from the case but the chancery court proceeded to try the action for damages and awarded judgments for all of the complainants. Judgment awarded for one of the complainants who failed to appear at the trial and upon whose behalf no evidence was given by any witness was reversed on appeal. Judgment for the other complainants was allowed to stand.

In the case of *Grantham v. McCaleb*[31] the plaintiff Grantham was the grantee in certain deeds of mineral interest in land which deeds were prepared and placed with the defendant bank as escrow agent, together with drafts for the consideration, the bank having the duty to collect the drafts and deliver the deeds. The cashier, on discovering a typographical inadvertance in one of the deeds, induced the

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[30]29 So.(2d) 455 (Miss. 1947).
[31]30 So.(2d) 312 (Miss. 1947).

grantor to withdraw that deed and to convey his interest in the property to the cashier and another person.

It was held that the action of the cashier was tortious, and rendered the bank, the cashier, and the new grantee liable to the plaintiff for non-delivery of the deed. The Court observes that it was no concern of the bank whether the instruments were valid or not; that the gratuitous appraisal thereof by the cashier was no more appropriate than would be an adjudication that a bill of lading attached to a draft covered goods which offended the taste of the cashier. A decree dismissing the bill was reversed and a decree rendered for the plaintiff.

*Whitmore Brothers Corp. v. Grandpre*[32] presented the unusual proceeding of a cause of action based upon the Workmen's Compensation Act of Massachusetts. The plaintiff was an employee of a Massachusetts corporation which carried insurance with the other defendant, American Mutual Liability Insurance Company, under the Workmen's Compensation Act above mentioned. He was injured in a traffic accident in the State of Louisiana and brought his suit at Vicksburg, Mississippi by attachment in chancery.

The complainant obtained a decree against the insuranc company, which decree was affirmed. Several interesting questions arose on appeal, including the question of whether or not the complainant, who traveled in his own automobile and according to his own routing and paid his own expenses, was an employee under the terms of the Compensation Act, and whether or not he was covered by the act while traveling from his regular territory to the place of his residence; also whether or not he was estopped to proceed against his employer's insurance carrier because of his suit against the other motorists with whom he had collided.

## VII

## TRUSTS AND WILLS

*C. Sidney Carlton**

The case of *Grantham v. McCaleb*[1] is an interesting one which involves the imposition of a trust *ex maleficio*. The rationale of the holding is, in my opinion, the conscience of a court of equity. None shall be heard to take advantage of his own wrong in that court.

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[32]30 So.(2d) 896 (Miss. 1947).

*Member Mississippi State Bar Association and Bar Association of Second Judicial District of Tallahatchie County; Carlton & Henderson, Sumner, Mississippi.

[1]30 So.(2d) 312 (Miss. 1947).

The Court held that the holders of the legal title to certain mineral interests were trustees for those whom they had wronged, when the facts, of course, showed a direct intention to hold the title for themselves. The trust is one imposed by operation of the conscience of the equity court regardless of and in spite of the intention of the parties.

It was imposed here despite the fact that the instrument on which the holding was based had several typographical errors therein which, to say the least, rendered vague the intention of the parties thereto. There was, however, no conflict in the testimony as to the intention subsequent to the finding of such errors, and the grantor had agreed to correction.

What part these latter considerations had, if any, in the decision is not clear.

The case of *In Re Johnson's Estate,*[2] posed no particularly difficult problems. There the Court held that a testamentary trustee who had discretionary authority to sell certain property of the testator could not be compelled to sell the same against his opposition. It appeared that the trustee did not oppose the petition for sale pursuant to the provisions of the will and that he "may indeed be held to join in the prayer." It is submitted that the fact that he "indeed" joined in the prayer was the basis for the decision of the Court.

In *Shepherd v. Johnston*[3] the Court used the "trust" device to avoid an inequity which would have resulted from the application of the Statute of Frauds. This use of the trust doctrine is a familiar one—one of its proper and beneficial uses.

It was alleged that a resulting trust arose when the defendant acquired the legal title to certain lands to be held as security for a loan made by defendant's husband to complainants. The defendant urged that the action was an attempt to compel transfer of the lands predicated directly upon an alleged oral contract.

It was held, upon the complainant's theory of the case and the allegations of his bill of complaint, that the suit was not to enforce an oral contract for the purchase of lands, contrary to the Statute of Frauds, but was a suit to establish a resulting trust.

It is submitted that this is a particularly proper field for equity jurisdiction, but one which must be exercised with great care and cau-

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[2]29 So.(2d) 839 (Miss. 1947).
[3]28 So.(2d) 661 (Miss. 1947).

tion to insure the prevention of the result sought to be avoided by the Statute of Frauds.

*Jones v. Crawford*[4] also involved an alleged resulting trust. The Court stated that:

> "A resulting trust transforms a prior intention of the parties into an obligation by the grantee to hold and deal with the land in recognition thereof. Here, there was no resulting trust since [the transfer of the land to the grantee and his] assumption of such obligation . . . was not only beneficial to the grantor but was in compliance with such intention."

There was no intention to create a situation which might be called in law a "resulting trust." In fact, there was a contrary intention. The fact that later developments showed the grantor her decision to convey and her conveyance was bad business did not alter the original intention—without which there was no such trust.

*Rhoads v. Peoples Bank & Trust Co.*[5] is a good example of the operation of the conscience of an equity court. There a bank was an escrow agent for the consummation of the sale of certain property, and a particular officer was handling the transaction. The complainant had deposited the purchase price with the bank.

Thereafter the officer's son's father-in-law obtained a personal loan from the officer and therewith purchased the property by raising the complainant's price.

Because of the fiduciary position of the officer and because of the knowledge of the facts implied in the buyer, it was held that he was a constructive trustee of the property for the benefit of the complainant who was entitled to a conveyance of the property.

Verily, the conscience of the old Chancellors in England is still living in the jurisprudence of Mississippi!

The case of *Estes v. Estes,*[6] is to be properly considered under the heading of "Wills", but as it involves a question of fact relative to a trust, it is an appropriate vehicle for changing the subject at this point.

The will, probated in common form, and relative to which an issue of *devisavit vel non* was made up, was a short, simple, holographic one.

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[4] 30 So.(2d) 51 (Miss. 1947).
[5] 27 So.(2d) 552 (Miss. 1946).
[6] 27 So.(2d) 854 (Miss. 1946).

It provided: "March 1939. I give to my sister Caroline Wallace Estes Everything I own (real and personal) without bond. (Signed) Mary E. Estes."

The trust question arose from the use of the words "without bond," it being the contention of the contestant that these words denoted a gift to a fiduciary rather than a devise. The Court found, however, that the use of such words gave additional support to the view that the instrument was testamentary in character. No beneficiary was named and no purpose for a trust was disclosed.

The testatrix had shown concern over keeping the custody of the instrument shortly prior to her death, which was some five years after its execution, and this fact coupled with the use of the words "without bond", her continued control of the instrument until her death, the parol testimony relative to testamentary intent, and the favorable testimony in support of the alleged will by an heir who was deprived of her inheritance thereby, induced the Court to hold that the instrument was testamentary.

It was held that the parol evidence of testamentary intent on the part of the maker was admissible on the issue of *devisavit vel non.* The contestant further questioned the admissibility of the testimony of a sister who was deprived of her inheritance by the upholding of the instrument as a will, although it appeared probable that the legatee under the contested instrument would leave her entire estate to the witness. The Court layed stress upon the fact that this witness, by her testimony in favor of the contested instrument, helped to deprive herself of an undivided one-third interest in the estate.

The fact that the contested instrument did not show the day of the month on which it was executed was held to be immaterial, since there was no question of capacity to make the instrument at any time during the particular month.

It is, of course, elemental that the courts of our State will attempt, from the wording of a testamentary instrument and otherwise, to determine the intention of the testator. It is this intention which is sought to be effectuated, unless so to do would require violation of some specific legal rule. There were two decisions of our Court during the past term which are interesting as showing how the Court sometimes arrives at the "intention" of the testator. These cases are *Temple v. First National Bank of Meridian*[7] and *Brumfield v. Englesing.*[8]

[7]30 So.(2d) 605 (Miss. 1947).
[8]30 So.(2d) 514 (Miss. 1947).

In the first of these, the testator bequeathed certain personal property, but no disposition was made of other personal property and of certain real estate. It was the contention of the heirs who were not remembered in the will that the personal property must first be sold for the payment of the probated debts before the real estate—even though not devised—could be subjected to sale for the payment thereof. As to this real estate, the testator died intestate. There was no residuary clause.

We find, of course, that the law is well settled as to the order of disposition of property for the payment of debts, *in the absence of a clear testamentary intent to the contrary.* It was held, however, that when the testator evidences an intention for disposition in an order contrary to the usual or statutory order, his intention must control. Here, his intent was found to be contrary to the general rule, and, therefore, the Court ruled that the real estate should be sold and the proceeds used for the payment of the debts of the estate, before the bequests contained in the will would be required to abate.

The rule was stated to be that a testator may provide in his will the order or priority of the application of his estate to the payment of his debts; that he may charge his real property with the entire burden of the debts of his estate to the complete exoneration of the personalty, or may apportion these debts between them; and that as between the statute[9] specifying that the personalty shall first be subject to the payment of the debts and a contrary intention on the part of the testator, the intent must control.

In the second of the last two above mentioned cases, the testator left a holographic will. In the bequest of realty, the testator failed to name a devisee. In the following paragraph the personalty was bequeathed to the testator's widow, that paragraph beginning with the words: "I likewise leave."

Both parties agreed that "the intent of the testator is controlling, and that in ascertaining such intent regard must be had to the whole instrument, and due weight given to every word of it." It was held that the bequest of the personal property with the use of the words "I likewise leave," taken together with the bequest of the realty, showed the testator's intent to devise the realty to the widow.

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[9]Miss. Code Ann. (1942), § 539.

In *Kullman v. Dreyfus' Estate*[10] the adjudication was that where a niece who was a residuary legatee under a will predeceased the testator, leaving a son as her sole surviving heir at law, the legacy lapsed, and the son was not entitled to the part of the estate devised to his mother. This decision called for the construction of the applicable statute.[11]

In *Boggan v. Scruggs*[12] it was held that, in the absence of a statute to the contrary, an oral promise to make a will may be proved as any other fact may be. This question arose in a cause wherein an account was probated for services had and received, when decedent failed to provide in his will for the claimant, as, it was alleged, he promised to do in return for such services.

Several interesting questions arose in the case of *Provenza v. Provenza*.[13] This cause involved a will contest in which attorneys filed an answer on behalf of certain interested parties and thereafter moved to be allowed to withdraw the answer. The Court sustained the motion. Contrary to the contention of some of the other parties, the trial court was held to have the right to proceed with the will contest. The answer had entered the appearance of all parties on whose behalf it was filed, and the subsequent sustaining of the motion to withdraw the same did not nullify the appearance.

Those parties were within the terms of the statute[14] requiring that in will contests all "interested parties" shall be made parties to the proceeding. The Court held that this included all parties having a pecuniary interest in the subject of the contest, including heirs at law, who are also "necessary parties."

Contestants alleged that the mother of the chief devisee had fraudulently induced the testator to believe the devisee was his illegitimate son. They offered proof tending to show that this devisee was not, in fact, the illegitimate son of decedent. Such proof was found to be immaterial.

The case of *In Re Mey's Estate*[15] gives us a broad statement of the requisites of a will. The writing involved was a letter written and

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[10]30 So.(2d) 81 (Miss. 1947).
[11]Miss. Code Ann. (1942), § 660.
[12]29 So.(2d) 86 (Miss. 1947).
[13]29 So.(2d) 669 (Miss. 1947).
[14]Miss Code Ann. (1942), § 506.
[15]29 So.(2d) 125 (Miss. 1946).

subscribed by the decedent and offered for probate subsequent to her death. The Court stated:

> "It appears clearly from this instrument that its writer had her death in mind when writing it, and intended by it to make the gifts set forth therein effective when that event should occur. This is all that is necessary to constitute a will."

An alleged alteration of a date in this instrument was not found to be presented for determination as such allegation could be raised only by plea, and not by demurrer.

The case of *Kendrick v. Hales*[16] is not important except to point up the extreme difficulty of establishing and securing admission to probate a purportedly lost holographic will.

In summing up the work of our Court during the past session on the subject of Wills, there appears to be little to say in the way of generalities, except that because of the difficulty of ascertaining the testamentary intention in many instances, honest differences of opinion on the part of laymen and lawyers alike are inevitable. This serves to point up the necessity for preparation of wills by experienced and able legal draftsmen; and the necessity for extreme caution, prudence, forethought, deliberation, and vigilance on the part of attorneys called upon to prepare these documents.

It is ever true that "A will is an instrument in which, after it become effective, a mistake may NEVER be corrected."

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[16]28 So.(2d) 574 (Miss. 1947).

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## SPECIAL APPEARANCE IN MISSISSIPPI

The Mississippi statute controlling special appearances, referred to herein as Section 1881, is as follows:

> Where the summons or citation, or service thereof, is quashed on motion of the defendant, the case may be continued for the term, but defendant shall be deemed to have entered his appearance to the succeeding term of the court.[1]

The apparent simplicity of this statute has proved deceptive during the half-century of its interpretation. The purpose of this note is to discuss cases which appear to create exceptions to the statute.

Before the adoption of Section 1881, the Mississippi Supreme Court showed a reluctance to allow a defendant to defeat the court's jurisdiction over his person.[2] Since the adoption of Section 1881, the court expressly has voiced its approval of the statute and a desire to avoid the creation of exceptions to it.[3] Despite these expressions by the court and the unequivocal wording of the statute, certain types of cases have developed in which an appearance tantamount to a "special appearance" has been allowed. These cases may be grouped as follows:

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[1] MISS. CODE ANN. (1942) § 1881. This statute first appeared in MISS. CODE (1892) § 3447. Excepting the words "Where the Summons or" in the place of the words "If the," the Mississippi statute is identical to the Texas statute, which was upheld in York V. Texas, 137 U.S. 15, 11 S.Ct. 9, 34 L.Ed. 604 (1890).

[2] ". . . it has been several times decided by this court that a motion to quash a writ for a defect which is amendable dispenses with the necessity to amend, upon the ground that the writ having served its purpose by bringing the parties or property before the court, and the defect being one which the statute regards as merely clerical and therefore makes amendable, the process shall not be held void, even though the amendment does not take place . . ." Spratley v. Kitchens, 55 Miss. 578, 581 (1878). *See* Young v. Rankin, 4 How. (5 Miss.) 27 (1839); Walker v. King, 1 How. (2 Miss.) 17 (1834). Accord: Dandridge v. Stevens, 12 Smedes & M. (20 Miss.) 723 (1849); Harrison v. Agricultural Bank, 2 Smedes & M. (10 Miss.) 307 (1844).

Other examples are: Davis, Admin. v. Patty, 42 Miss. 509 (1869); Fisher v. Battaile, 2 George (31 Miss.) 471 (1856); Jones v. Hunter, 4 How. (5 Miss.) 342 (1840); Stevens & Pellet v. Richer, 1 How. (2 Miss.) 522 (1837) (failure to serve all defendants cured by plea to merits). Lester v. Watkins, 41 Miss. 647 (1868); Schirling v. Scites, 41 Miss. 644 (1868); Miller v. Ewing, 8 Smedes & M. (16 Miss.) 421 (1847) (although attorney appeared without authority). Cole v. ohnson, 53 Miss. 94 (1876) (defective publication for nonresident cured by demurrer). Byrne, Vance & Co. v. Jeffries, 9 George (38 Miss.) 533 (1860); Lester v. Watkins, 41 Miss. 647 (1868) (waiver through statement attached to pleadings).

[3] McCoy v. Watson, 154 Miss. 307, 310, 122 So. 368, 369 (1929), wherein the court stated: "It has long been settled in our state both by statute . . . and by the general policy of our practice . . . that there is no such a thing as a special appearance in our courts. It is our settled, and long settled, practice that when a party comes in he must come in entirely or else he must entirely stay away . . . No lasting exceptions have ever been ingrafted by us upon that rule and it has proved, by this strict adherence to it, of inestimable value by the elimination of technical distinctions and incumbering embarrassments . . ."

I. Appearance to remove a case to a federal court;
II. Appearance to plead immunity to the service of process;
III. Appearance to deny the jurisdiction of the court because the defendant was brought into the court by fraud or trickery;
IV. Appearance in a trial *de novo* before the circuit court, after an appeal from a justice of the peace court, to question the jurisdiction of the court over the person of defendant;
V. Appearance of the nonresident in attachment or garnishment cases;
VI. Appearance by a foreign corporation to claim that it is not "doing business" within the state; and
VII. Appearance before the trial court as *amicus curiae* to question the court's jurisdiction of a defendant.

The only true special appearance is an appearance to object to the jurisdiction of the court over the person of the defendant.[4] All other appearances are general and subject the defendant to the jurisdiction of the court.[5] If a defendant, *in addition to questioning the jurisdiction over his person,* joins a plea, demurrer, answer, general issue, or any motion affecting the merits of the action, his appearance is a general one.[6] The *substance* of an appearance rather than its *form* determines whether it is general or special.[7] True, a few jurisdictions hold that all appearances are general unless they are specifically stated to be special; but even in those jurisdictions a mere statement that an appearance is special is not conclusive that it is such.[8] Grounds for a special appearance must be raised at the commencement of the suit; otherwise, the privilege to appear specially will be waived. Where a special appearance is overruled, the authorities are in conflict as to whether further pleading

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[4]Scott v. Wamsley, 215 Iowa 1409, 245 N.W. 214 (1932); Rorick v. Stilwell, 101 Fla. 4, 133 So. 609 (1931); 3 AM. JUR. 807; 6 C.J.S. 65. *See* RESTATEMENT, CONFLICTS OF LAWS (1934) § 82.

[5]Juston v. Ormes, 252 U.S. 469, 40 S.Ct. 369, 64 L.Ed. 667 (1919); Nations v. Johnson, 65 U.S. (24 How.) 195, 16 L.Ed. 628 (1860); Stanley v. Jones, 197 La. 627, 2 So.(2d) 45 (1941); Buckley v. S. Abraham Co., 172 La. 845, 135 So. 606 (1931); Miss. Cent. R. Co. v. May, 149 Miss. 334, 115 So. 561 (1928); BEALE, THE CONFLICTS OF LAWS (1935) 391, 392; 3 AM. JUR. 801, 803; 6 C.J.S. 44-48.

[6]Steinberg v. Steinberg, 139 Fla. 219, 190 So. 486 (1939); St. Louis Cordage Mills v. Western Supply Co., 54 Okla. 757, 154 P. 646 (1916); State *ex rel* Howie v. Benson, 108 Miss. 779, 781, 67 So. 214, 215 (1914), which states: "It is unnecessary to cite authorities in support of this proposition, *viz.,* a plea to the merits waives jurisdiction of the person." *See* Manning v. Furr, 66 F.(2d) 807 (App.D.C. 1933); Stanley v. Jones, 197 La. 627, 2 So.(2d) 45 (1941).

[7]Leslie v. Woody, 93 Colo. 169, 171, 24 P.(2d) 754, 755 (1933); Rogers v. Penobscot Mining Co., 28 S.D. 72, 132 N.W. 792, Ann.Cas. 1914A 1184 (1911); 3 AM. JUR. 789, 790.

[8]Barnum v. District Court of 14th Judicial District of Colo., 74 Colo. 48, 218 P. 912 (1923).

by defendant will constitute a general appearance. Some jurisdictions require the defendant to appeal from the order denying his special appearance;[9] other jurisdictions hold that a defendant does not waive his privilege by going to trial on the merits.[10]

Some form of special appearance by a defendant to object to jurisdiction of the court over his person is allowed in every state except Mississippi and Texas.[11] The constitutional power of a state to deny by legislation the privilege of a special appearance before its courts was first recognized in *York v. Texas*.[12] The Texas statute[13] construed in

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[9]Ake v. Chancey, 152 Fla. 677, 13 So.(2d) 6 (1943); Bowmall v. Bowmall, 127 Fla. 747, 174 So. 14 (1937); Henry v. Spitler, 67 Fla. 146, 64 So. 745 (1914); Note (1933) 93 A.L.R. 1302; 3 Am. Jur. 807.

[10]Baldwin v. Iowa State Traveling Men's Ass'n., 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244 (1930); Jones v. Jones, 108 N.. 415, 15 N.E. 707, 2 Am.St.Rep. 447 (1888); Note (1933) 93 A.L.R. 1302.

[11]In Colorado there appears to be a limited right to appear specially under Supreme Court Rule 4, 1935, which provides: "A motion to quash a summons or scire facias or service of either shall, *if overruled,* be deemed a general appearance of the party making such motion. This rule shall not apply where the moving party claims exemption from service or process . . ." (Italics added) But see, People v. District Court of Routt County, 97 Colo. 485, 50 P.(2d) 789 (1935), (1937) 10 Rocky Mt. L. Rev. 63, 82.

In Illinois, under § 43(3) of the Civil Practice Act, there appears to be some conflict over the right of the court to allow a special appearance. There is authority holding that it is error for a court to allow a special appearance under any circumstances: Edmunds, *Special Appearance Under Illinois Civil Practice Act* (1942) 7 John Marshall L. Q. 297; Bebb, *The Special Appearance Ghost* (1942) 8 John Marshall L. Q. 56. *See* Book v. Ewbank, 311 Ill.App. 312, 35 N.E.(2d) 961 (1941); Thomas v. Ritholz, 310 Ill.App. 166, 33 N.E.(2d) 932 (1941).

In Iowa the right to appear specially was originally denied under Iowa Code (1897) § 3541, but this rule was changed in Iowa Code (1927) § 11088.

In Kentucky the Civ. Code § 755, which denied a special appearance, was changed by the Code of 1924, § 734a.

*See* Blair, *Constructive General Appearances and Due Process* (1928) Ill. L. Rev. 119, 121-130; Sunderland, *Preserving a Special Appearance* (1911) 9 Mich. L. Rev. 396, 397.

[12]137 U.S. 15, 11 S.Ct. 9, 34 L.Ed. 604 (1890).

[13]The Texas statute last appeared in 5 Tex. Stat. (Vernon's Ann. 1941) Art. 2048, but by Tex. Gen. Laws 1939, c. 25, the Texas Supreme Court was given power to make rules, which were to supersede any existing statutes. Rule 122 of the Texas Rules of Civil Procedure, 136 Tex. 4333, 483 (1941), now controls attempted special appearances in Texas and is as follows: "If the citation or service thereof is quashed on motion of the defendant, such defendant shall be deemed to have entered his appearance at ten o'clock a.m. on the Monday next after the expiration of twenty (20) days after the day on which the citation or service is quashed, and such defendant shall be deemed to have been duly served so as to require him to appear and answer at the time, and if he fails to do so, judgment by default may be rendered against him."

The present rule of the Texas Civil Procedure is a concise statement of the interpretation given the original statute, Art. 2048, above, which was sustained in York v. Texas, note 12 *supra*. Since the Mississippi Statute is identical, for all practical purposes, to the original Texas statute it would appear that the same results achieved in Rule 122, above, would be the prevailing Mississippi rule.

A few of the Texas decisions denying a special appearance are: Erickson v. Texas Employers' Ins. Ass'n., 97 S.W.(2d) 721 (Tex.Civ.App. 1936); Belknap

the *York* case and Section 1881 are practically identical. The United States Supreme Court subsequently has held that even in the absence of statute a state court might deny the privilege without violating due process.[14]

### I. REMOVAL TO FEDERAL COURT

The federal courts,[15] and a majority of the state courts,[16] recognize that an appearance in a state court merely to remove a case to the federal court is a special appearance. A few jurisdictions hold that such a petition is a general appearance.[17] If the case is remanded to the state court, or the motion to remove is denied, most jurisdictions deem the appearance to be special, at least where no plea is made to the merits.[18] The Mississippi Supreme Court in *Britton v. Beltzhoover*[19] held that an appearance ot remove to the federal court was general. The later case of *McCoy v. Watson,*[20] however, expressly restricted the prior holding to its facts and in effect overruled it on the question of appearance. The court definitely stated that the defendant had not made a general appearance.

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Hardware & Mfg. Co. v. Lightfoot, 75 S.W.(2d) 481 (Tex.Civ.App. 1934) (attorney appeared to call court's attention to a defect in the citation); Lindley v. Merchants' & Farmers' State Bank, 264 S.W. 159 (Tex.Civ.App. 1924); Early & Clement Grain Co. v. Fite, 147 S.W. 673 (Tex.Civ.App. 1912); Missouri, K. & T. Ry. Co. v. Scoggin & Depree, 123 S.W. 299 (Tex.Civ.App. 1909); Westinghouse Electric & Mfg. Co. v. Torell, 30 Tex.Civ.App. 200, 70 S.W. 324 (1902). Other cases are cited in notes 43, 62, and 82, *infra.*

For application of Texas rule in federal court see: Creager v. Collier & Son Co., 36 F.(2d) 781 (S.D.Tex. 1929).

[14]Chicago Life Insurance Co. v. Cherry, 244 U.S. 25, 37 S.Ct. 492, 61 L.Ed. 966 (1917).

[15]Morris & Co. v. Skandinavia Ins. Co., 279 U.S. 405, 49 S.Ct. 360, 73 L.Ed. 762 (1928) (removal from a Miss. court); Michigan Central R. Co. v. Mix, 278 U.S. 492, 49 S.Ct. 207, 73 L.Ed. 470 (1928); 6 C.J.S. 38.

[16]Byrd v. Rector, 112 W.Va. 192, 163 S.E. 845, 81 A.L.R. 1213 (1932); Llanez v. Chisos Mining Co. 285 S.W. 646 (Tex.Civ.App. 1926); Gouner v. Missouri Valley Bridge & I. Co., 123 La. 964, 49 So. 657 (1909); Bryan v. Norfolk & W. R. Co., 119 Tenn. 349, 104 S.W. 523 (1907); Note (1932) 81 A.L.R. 1219.

[17]Rorick v. Chancey, 142 Fla. 290, 195 So. 418 (1938) (court split 3 to 3) State *ex rel.* Neil v. Love, 110 Fla. 91, 148 So. 208 (1933).

[18]Electrolytic Chlorine Co. v. Wallace & T. Co., 328 Mo. 782, 41 S.W.(2d) 1049, 78 A.L.R. 930 (1931).

[19]147 Miss. 737, 113 So. 346 (1927).

[20]153 Miss. 416, So. 116, *sug. error overr.*, 154 Miss. 307, 122 So. 368 (1929). On the suggestion of error the court stated: "The whole difficulty has been brought about by the loose use of the term 'special appearance' in connection with petitions for removal, whereas the actual legal fact is that a party 'appearing' in a state court for the purpose of presenting a petition for removal has not appeared at all in the legal sense in the state court. In so appearing he does not in any way submit himself to the jurisdiction of the state court . . ." *Id.* at 311, 122 So. at 269.

The holding in the *McCoy* case is in accord with Cain v. Commercial Pub. Co., 232 U.S. 124, 131, 34 S.Ct. 284, 286, 58 L.Ed. 534, 537 (1913), which involved removal of a case from a Mississippi court to the federal court and the effect of Sec-

One question was left unanswered by the *McCoy* case. If a petition for removal to the federal court is assumed to be synonymous with a motion to quash the process, in that it raises only the question of the jurisdiction of the state court over the person of the defendant, what is the result when a petition for removal is overruled? Under Section 1881, would the defendant be deemed to have entered his appearance to the next term of court? If this question is presented in Mississippi, it is believed that the rule of the *McCoy* case will be extended.

### II. IMMUNITY TO SERVICE OF PROCESS

The general rule in this country is that when a nonresident comes into a state as a witness or party litigant he is immune from service of civil process while going to, attending, or returning from court.[21] This immunity of nonresidents is recognized in the absence of statute.[22] The same immunity generally, with limited exceptions, is extended to officers of foreign corporations who attend an action as a witness or party litigant.[23] The exemption is personal and may be waived if not promptly and properly claimed.[24] Any plea which is to the merits of the action is deemed a waiver. The proper way to claim the immunity, and the one generally used, is by a motion to quash the process.

If a nonresident defendant attempts to claim this immunity in Mississippi, the question is raised as to whether the immunity is affected by Section 1881. This question was answered in *Arnett v. Carol C. & Fred R. Smith, Inc.*[25] In that case the nonresident defendant was served with civil process, personally and as president of a foreign corporation,

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tion 1881, wherein the Court stated: "(1) The right and procedure of removal of actions from a state court are to be determined by the Federal law. (2) The legislature or the judiciary of a state can neither defeat the right nor limit its effect . . . (4) A suit must be actually pending in a state court before it can be removed, but its removal to the court of the United States does not admit that it was rightfully pending in the state court, or that the defendant could have been compelled to answer therein . . . 'We are of the opinion that the filing of a petition for removal does not amount to a general appearance, but to a special appearance only.'"

[21]Lamb v. Schmitt, 285 U.S. 222, 52 S.Ct. 317, 76 L.Ed. 720 (1931); 42 Am. Jur. 119, 122-124; 50 C.J. 547, 548.

[22]The immunity may include residents attending court in counties other than that of their residence as well as nonresidents. Sewanee Coal, Coke & Land Co. v. Williams, 120 Tenn. 339, 107 S.W. 968 (1908); Powers v. Arkadelphia Lumber Co., 61 Ark. 504, 33 S.W. 842, 54 Am.St.Rep. 276 (1896); 42 Am. Jur. 127, 128; 50 C.J. 550.

[23]Rix v. Sprague Canning Machinery Co., 157 Wis. 574, 147 N.W. 1001, 52 L.R.A.(N.S.) 583 (1914).

[24]Northwestern Casualty & S. Co. v. Conaway, 210 Iowa, 126, 230 N.W. 548, 68 A.L.R. 1465 (1930); *In re* Hall, 296 F. 780 (S.D.N.Y. 1924); 42 Am. Jur. 135; 40 C.J. 556, 559.

[25]165 Miss. 53, 145 So. 638 (1932).

while attending a justice of the peace trial. The court held that immunity from service of civil process prevailed in spite of Section 1881. This holding seems proper if limited to cases in which the immunity is claimed promptly and properly.

In the *Arnett* case, the court discussed the question of whether the defendant, by appearing and moving to quash the process and pleading in abatement, "waived individually, and for the corporation, his and its terirtorial jurisdiction?"[26] In answer to this question the court stated:

> By virtue of the section[27] . . . foreign corporations are subject to suit in this state only when "found doing business in the state," and therefore as against the appellant corporation the circuit court of Lee county was *without territorial jurisdiction* of the cause of action. This being true, it did not, by pleading the want of jurisdiction . . . waive such want of jurisdiction.[28] (Italics added)

Aside from the immunity of the defendants, the foregoing statement is given as an additional reason for the inapplicability of Section 1881. It is submitted that this statement of the court contains two errors: (1) "territorial jurisdiction" is confused with "venue," and (2) the statute referred to is not one regulating the *venue* of suits against foreign corporations[29] but is one which confers on the state courts *jurisdiction* over such corporations.[30]

The term "territorial jurisdiction" has been used by the Mississippi court frequently and often loosely. A full discussion of "territorial jurisdiction" is not within the scope of this note, but the term demands a brief discussion. Territorial jurisdiction has a definite connotation in

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[26]Arnett v. Carol C. & Fred R. Smith, Inc., 165 Miss. 53, 62, 145 So. 638, 639 (1932).

[27]Miss. Code Ann. (1942) § 5345, which provides: "Any corporation claiming existence under the laws of any other state or of any other country foreign to the United States, found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are, whether the cause of action accrued in this state or not."

[28]Arnett v. Carol C. & Fred R. Smith, Inc., 165 Miss. 53, 68, 145 So. 638, 641 (1932).

[29]City Co. of New York v. Stern, 110 F.(2d) 601, 604 (C.C.A. 8th, 1940), in which the court stated: "Consent to the jurisdiction of the courts of a state by an individual or corporation residing outside the state implies neither presence nor residence within the state. Jurisdiction of the courts to determine controversies does not necessarily depend upon the residence of the parties within the territorial jurisdiction of the court." *See* Garber v. Bancamerica-Blair Corp., 250 Minn. 275, 285 N.W. 273 (1939).

[30]Cudahy Packing Co. v. Smith, 191 Miss. 31, 2 So.(2d) 247 (1941); First Nat. Bank v. Cottonseed Prod. Co., 171 Miss. 282, 157 So. 349 (1934); 23 Am. Jur. 474-490.

Private International Law, where the term most frequently is used to refer to the power of a sovereign.[31] The territorial theory of the power of the sovereign was given force by Dutch writers in the early seventeenth century and was introduced in this country through Story's *Commentaries on the Conflict of Laws*. More commonly, territorial jurisdiction is used to refer to the power of a court over property or persons within the confines of its territory in order to distinguish such power from other types of "jurisdiction." A New York court has given this explanation:

> The word "jurisdiction," apart from other general meanings, has to every lawyer at least a twofold significance, which may perhaps be conveniently divided into territorial jurisdiction and jurisdiction of the subject-matter. Territorial jurisdiction ordinarily connotes power over property situated within the territory, and power over persons resident therein, or who may be found therein. Jurisdiction of the subject-matter relates generally to the character of controversy of which the court is authorized to take cognizance . . . *The concept of territorial jurisdiction imports power of the court over all the property within its confines, and over all its residents, and over nonresidents while sojourning in its territory. . . .*[32] (Italics added)

Generally the power of the court is said not to extend to persons beyond its territorial limits. This does not mean that when such persons come within the court's territorial limits the court's power does not attach. Under Section 1881, the presence of a person within the territorial limits of a court's jurisdiction and an attempt to appear specially should constitute a general appearance. Where the defendant is immune or is enticed into the jurisdiction by fraud, the court does not lack jurisdiction but in a proper exercise of its discretion simply refuses to exercise its power.

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[31]Manchester v. Massachusetts, 139 U.S. 240, 11 S.Ct. 559, 35 L.Ed. 159 (1890); Bosarge v. State, 23 Ala.App. 18, 131 So. 427 (1929).

[32]American Historical Society, Inc. v. Glenn, 131 Misc.Rep. 291, 277 N.Y.S. 174, 178, 179 (1928). *See* Salzman v. Attrean, 142 Misc.Rep. 245, 254 N.Y.S. 288, 291 (1931), in which the court states: "The territorial jurisdiction of a court is a matter of substance and not of form . . . its geographical boundaries are designed and prescribed with a definite purpose and object in view; i.e., to constrict the extent of its operation and authority . . . it is a limitation which is fundamental and real, and not merely theoretical; and, however much it may be desired and necessary to convenience that the process of a court reach beyond its geographical barriers, the power to change . . . resides with the Legislature and not with the judiciary . . ."

*Jurisdiction,* which includes "territorial jurisdiction," is to be distinguished from *venue.* Legion are those cases which show that jurisdiction connotes the *power* to decide a case on the merits, while venue connotes the *place* where the suit should be heard.[33] The parties to an action may appear within the "territorial jurisdiction" of a court, giving such court *jurisdiction* (power) over their person, but by statute the proper *venue* (place) may be in another county. The parties cannot confer jurisdiction by consent or waive lack of jurisdiction to hear the cause; for example, the parties cannot agree to obtain a divorce in any circuit court in Mississippi: only a chancery court has jurisdiction in this type of case. On the other hand, parties may waive their privilege to object to improper venue in all cases except local actions. In local actions venue is given jurisdictional effect. Other than in these localized actions, venue involves neither jurisdiction nor "territorial jurisdiction."[34]

The recurrence of the term "territorial jurisdiction" will be noted throughout this discussion of special appearances because the writer believes that a spurious use by the court of the term "territorial jurisdiction" has contributed to the strained constructions of Section 1881.

### III. FRAUD OR TRICKERY

In *Nicholson v. Gulf, Mobile & N. R. Co.,*[35] the court announced the "general rule that in a civil case a court will not take jurisdiction based on a service of process on a defendant who was brought within the reach of its process wrongfully or fraudulently, or by deceit, or any other improper device, provided of course the wrong or deceit is chargeable to plaintiff. *This rule is based not on a lack of jurisdiction but on the view that it is improper for a court to exercise a jurisdiction so obtained.*" (Italics added)

One of the nonresident defendants in the *Nicholson* case was induced by the plaintiff's attorney to come into the state and while here he was served with process. This enabled the plaintiff to acquire jurisdiction over the co-defendant, a railroad company. Both defendants objected to the jurisdiction of the court. To do so, they brought themselves within the "territorial jurisdiction" of the court, and the court might have found that their appearance was general. Conceding this to be true, the court properly refused to exercise its jurisdiction because of the fraudulent acts of the plaintiff in serving process on the defend-

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[33]Grenada Bank v. Petty, 174 Miss. 415, 423, 164 So. 316, 317 (1935). *See* Toulmin v. James Mfg. Co., 27 F.Supp. 512 (W.D.N.Y. 1939); 21 C.JS. 33.

[34]Coffman, *Jurisdiction or Venue?* (1936) 20 MINN. L. REV. 617.

[35]177 Miss. 844, 853, 172 So. 306, 308 (1937).

ants. In reaching the correct result, the court uses this misleading language:

> In challenging the jurisdiction of the court by its plea in abatement, the appellee [defendant] did not waive jurisdiction of the court, as it is well settled in this state that *where there is a lack of venue or territorial jurisdiction, a defendant does not waive jurisdiction by pleading that fact* . . .[36] (Italics added)

This is another statement in which "venue," "territorial jurisdiction," and "jurisdiction" are confused. If the court has jurisdiction over the defendant's person, this does not affect jurisdiction of the subject-matter, which cannot be waived and can be raised at any time. Under Section 1881, such a plea does submit the defendant to the court's "territorial jurisdiction" (power over the person within its territorial limits), and the question of (place) may be waived if such is not promptly and correctly raised. If the court attempts to extend its jurisdiction (power) beyond its territorial limits and the defendant does not appear, his privilege to raise the question at any time is not waived because the action of the court is void. When the defendant does appear before the court his presence removes the lack of "territorial jurisdiction." Apparently what the court means in the above staetment in referring to the "jurisdictional" effect of a motion to quash under Section 1881 was stated more correctly in the earlier case of *Batson & Hatten Lumber Co. v. McDowell:*

> That statute has nothing whatever to do with jurisdiction of the subject-matter, nor the venue of the action. It is addressed alone to the jurisdiction of the person of the defendant. *By a motion to quash, whether such motion be sustained or overruled, the defendant waives any question of jurisdiction over his person;* but he does not waive jurisdiction over the subject-matter and of venue, and each and all other questions which he would be entitled to raise if he had been brought in by process, instead of by motion to quash . . .[37] (Italics added)

### IV. APPEAL FROM JUSTICE OF THE PEACE COURT

In most jurisdictions which allow a special appearance, an appeal by a defendant to a court where the trial is *de novo,* from a judgment

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[36]Nicholson v. Gulf, Mobile & N. R. Co., 177 Miss. 844, 852, 172 So. 306, 308 (1937). The authorities cited by the court are not controlling and can be distinguished easily; for example, the *Arnett* case, discussed herein under Part II.

[37]159 Miss. 322, 325, 326, 131 So. 880, 881 (1930).

of a justice of the peace court entered without valid process and without the defendant's appearance, is a general appearance.[38] The defendant generally can obtain a review of the judgment of a justice of the peace court by writ of certiorari without entering a general appearance.

In Mississippi, even though Section 1881 in effect prohibits a special appearance, an appeal from the judgment of a justice of the peace court rendered on void process without defendant's appearance has been held not to constitute a general appearance in the circuit court. Three decisions have permitted a "special appearance" in this type of case[39] on the ground that the justice of peace court is without "territorial jurisdiction." These cases were distinguished in *Turner v. Williams*,[40] which, it is submitted, reached a more desirable result. In the *Turner* case the court stated:

> Where a court has jurisdiction of the subject-matter and suit is brought in the proper venue, the appearance of the defendant in the cause for any purposes is an appearance for all purposes. It is

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[38] *In re* Woody's Estate, 93 Colo. 169, 24 P.(2d) 754 (1933); Gulf Pipe Line Co. v. Vanderberg, 28 Okla. 637, 115 P. 782, 34 L.R.A.(N.S.) 661, Ann.Cas. 1912D 407 (1911); 3 AM. JUR. 797, 798; 6 C.J.S. 41, 42.

[39] (1) Mississippi Central R. Co. v. Calhoun, 140 Miss. 289, 105 So. 519 (1925). In this case the defendant railroad was sued for killing a cow in the district of a justice of the peace wherein it had formerly operated a line. Process was served on a former agent of the defendant, who resided in the district, but there was no appearance by the defendant. There was judgment by default, and defendant appealed to the circuit court for a trial *de novo*. The cause was dismissed by the Supreme Court because the justice of peace had not jurisdiction and the circuit court could acquire none.

(3) Heggie v. Stone, 70 Miss. 39, 12 So. 253 (1892). Here the defendant was sued before the mayor of a town on a cause of action that arose outside the corporate limits. Although defendant resided outside the town, he appeared and the case was tried on its merits. The plaintiff appealed to the circuit court, where defendant moved to dismiss because the mayor had no "territorial jurisdiction." Defendant's motion was granted, and this was affirmed by the Supreme Court.

(3) Cain v. Simpson, 53 Miss. 521 (1876). In this case the defendant, a resident of *X* county, was sued before a justice of the peace while in *Y* county. He objected to the court's jurisdiction, which was overruled, and allowed a judgment *quod recuperit* to be taken. On appeal to the circuit court, defendant's objection was sustained. This was affirmed by the Supreme Court.

In all three cases the court's want of "territorial jurisdiction" should have been cured by the defendant's appearance before the justice of the peace or by his appearance at the trial *de novo* in the circuit court.

[40] 162 Miss. 258, 139 So. 606 (1931). It was in this case that the correct procedure for the defendant to follow was announced if he was to avoid making a general appearance, which was as follows: "It is true the result is that appellant is deprived of a trial of the cause before the justice of the peace, but that was brought about by his own misconception of the remedy to pursue. He should have either enjoined the execution of the judgment of the justice of the peace, or taken the cause up to the circuit court on writ of *certiorari* . . ." *Id.* at 263, 139 So. at 608.

In the case of McDugle v. Filmer, 79 Miss. 53, 29 So. 996, 89 Am.St.Rep. 582 (1901), a writ of certiorari was taken from a judgment by default in a justice of

> a general appearance . . . This principle, however, has nothing to do with the right of the defendant to have a cause dismissed where the court is without jurisdiction of the subject-matter, or where there is *lack of territorial jurisdiction.* In such case the defendant has the right to plead, in abatement of the cause, *the want of jurisdiction;* his appearance for the purpose is not a limited appearance. It is general; nevertheless it does not waive such want of jurisdiction . . .[41] (Italics added)

The right to plead the "want of jurisdiction" of the subject-matter cannot be waived.[42] But the right to plead the "lack of territorial jurisdiction" is subject to two interpretations. First, where the "lack of territorial jurisdiction" is due to the *defendant* being beyond the court's geographic limits, such want of jurisdiction is overcome by the defendant's appearance in court. Second, if the "lack of territorial jurisdiction" is due to the *court* being beyond its territorial boundaries, or the court attempts to extend its jurisdiction (power) beyond its territorial boundaries (excepting certain conflict of law questions not involved herein), a general appearance by the defendant would not waive want of jurisdiction. The facts in the *Turner* case bring it within the first interpretation, and the court properly held the appearance to be general.

### V. ATTACHMENT OR GARNISHMENT

In jurisdictions permitting a special appearance there is a conflict of authority as to whether an attack by a nonresident upon an attachment

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the peace court, which was entered on a void service of process. The Supreme Court held that the service of process was a nullity and conferred no jurisdiction on the justice of peace. The case was remanded for the circuit court to return the case to the justice of peace for further proceedings.

Additional authority for the holding in the *Turner* case can be found in the companion statute to Section 1881 (Miss. Code Ann. (1942) § 1882), which states: "Where a judgment or decree is reversed on appeal taken by defendant for the want of service, or because of defective service of process, a new summons or citation need not be issued or served, but the defendant shall, without such process or service, be presumed to have entered his appearance to the cause in the court from which the appeal was taken when the mandate shall be filed therein."

[41]Turner v. Williams, 162 Miss. 258, 262, 139 So. 606, 607 (1931). This statement by the court continues with a citation of the three cases discussed in note 39, *supra,* and then states that they "were all cases where the court was without *territorial jurisdiction.* The court held in those cases that the defendant could appear and object to the jurisdiction of the court without waiving the jurisdiction." (Italics added) This statement is subject to the same objections made against other misuses of the term "territorial jurisdiction" as pointed out in Part II above. *See* Illinois Central R. Co. v. Swanson, 92 Miss. 485, 46 So. 83 (1908), which is in accord with the *Turner* case.

[42]Waits v. Black Bayou Drainage Dist., 186 Miss. 270, 185 So. 577 (1939); Myrick v. Mansell, 184 Miss. 701, 185 So. 581 (1939); Dulion v. Folkes, 153 Miss. 91, 120 So. 437 (1928).

or garnishment proceeding in a special or a general appearance.[43] In Mississippi, because of Section 1881 and the statutes controlling attachment and garnishment,[44] any attack on such proceedings should constitute a general appearance. The contrary, however, is true under certain circumstances.

The jurisdictional basis of an attachment in Mississippi, according to one authority,

> . . . is one primarily *in rem;* and in order to give jurisdiction in chancery by attachment against a non-resident there must exist the following factors: (1) the nonresidence of the debtor; and (2) either (a) that he owns lands in this state, or (b) that there are effects belonging to him in the hands of a person in this state, or (c) that there is some person in this state indebted to the said non-resident debtor; and (3) the issuance of the proper process against the land, or effects, or debt, as provided by the statute, so as to bring the *res* under the control of the court; and it is well settled that when the jurisdictional facts do not exist the proceedings must be dismissed, even though the non-resident defendant has appeared, provided that in his appearance he raise at the outset the defect as to jurisdiction, and thus does not waive it . . . if an attachment is not based on one of these grounds its dismissal must follow on a motion to quash, and such a motion is not such an appearance as cures the jurisdiction . . .[45]

The action is said to be "primarily *in rem*" because the attachment statute expressly provides: "The court shall give a decree *in personam* against such non-resident, absent or absconding debtor if summons has been personally served upon him, *or if he has entered an appearance.*"[46]

If the action were entirely *in rem,* there would be no basis for a "special appearance," as such, since the court would have jurisdiction to enter a valid decree against the *res* without any appearance by the

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[43]That defendant enters a general appearance, subject to *in personam* judgment: Johnson v. Holt's Adm'r., 235 Ky. 518, 31 S.W.(2d) 895 (1930); People's State Bank of Bradley v. Nordness, 50 S.D. 216, 208 N.W. 984 (1926); Robuck v. Rasmussen, 251 S.W. 1115 (Tex.Civ.App. 1923); Osvald v. Williams, 187 S.W. 1001 (Tex.Civ.App. 1916); Note (1927) 55 A.L.R. 1126.

That defendant can appear specially: Adams v. Trepanier Lumber Co., 117 Ohio St. 298, 158 N.E. 541, 55 A.L.R. 1118 (1927); Lyon v. Baldwin, 194 Mich. 118, 160 N.W. 428, L.R.A. 1917C 148 (1917); Note (1927) 55 A.L.R. 1121.

3 Am. Jur. 798, 799; 6 C.J.S. 39, 40.

[44]Miss. Code Ann. (942) §§ 2676, 2677, 2678, 2729.

[45]Griffith, Mississippi Chancery Practice (1925) § 484.

[46]Miss. Code Ann. (1942) § 2729. (Italics added)

nonresident. The possibility of also obtaining a judgment *in personam* under the statute, however, presents the problem of when the nonresident has "entered his appearance." Since Section 1881 applies to actions in chancery,[47] as well as law, any objection to personal jurisdiction by a nonresident should be the equivalent of a general appearance. The Mississippi Supreme Court has not followed this reasoning, as is shown by several attachment cases allowing a "special appearance."

### *A. Against Federal Banks*

Starting with the case of *National City Bank of St. Louis v. Stupp Bros. Bridge & Iron Co.*,[48] the court has allowed nonresident national banks to appear specially on the grounds that a federal statute denied the court jurisdiction to attach their funds before judgment. In answer to the claim that the national bank had made a general appearance, subjecting it to a judgment *in personam,* the court stated that Section 1881 has no application here. "The motion to quash is not based on any defect in process or the service thereof, but is based on the want of power in the court below to proceed against the National City Bank by attachment before a judgment should be rendered against it."[49] This statement may be true, but it does not prevent the appearance of the bank from being general. The only limitation placed upon the court's jurisdiction (power) by the federal statute is that the court cannot issue an attachment before judgment against a national bank. The statute does not prevent the court, once it obtains jurisdiction of the bank's "person," from granting a judgment *in personam* on the original cause of action. The Mississippi attachment statute expressly authorizes such a judgment. In view of this attachment statute and Section 1881, it should be impossible for Mississippi to follow those jurisdictions allowing a special appearance in this type of case.[50]

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[47]GRIFFITH, *op. cit. supra* note 45, §§ 241, 242, 249.

[48]147 Miss. 747, 113 So. 340 (1927).

[49]National City Bank of St. Louis v. Stupp Bros. Bridge & Iron Co., 147 Miss. 747, 758, 113 So. 340, 341 (1927).

[50]The court cites as authority for its holding a United States Supreme Court case and 6 C.J. 477. Although these may represent the majority view, it should be remembered that Mississippi is unable to follow these authorities because of Section 1881. Since Mississippi is one of two states wherein the right to make a special appearance is denied, there always should be a majority of the states holding *contra.* A number of states which allow special appearances, however, consider an objection to an attachment suit a general appearance. *See* 6 C.J.S. 39, 40; 7 *id.* 646, 647.

The federal statute in question is 12 U.S.C.A. § 91; *see* 12 U.S.C.A. § 632.

In a later case[51] the Mississippi court relies on the *National City Bank* case to affirm a dismissal of an attachment under similar facts. The argument there was advanced that the court had jurisdiction under its general equity powers, but the court refused to approve that contention.

In *First National Bank of St. Louis v. Miss. Cottonseed Products Co.*[52] again the plaintiff claimed that the nonresident national bank had entered a general appearance. In answer to this contention, the court reasoned that there was no *res* within its territorial jurisdiction nor was there territorial jurisdiction of the national bank. The court's reasoning is open to attack. The federal statute does not operate to move the *res* outside the court's "territorial jurisdiction"; it only operates to deny the court the power to attach within its "territorial jurisdiction" the *res* that belongs to a national bank. Further, the lack of "territorial jurisdiction of the nonresident bank" was remedied when the bank entered an appearance.

The Alabama court has recognized its power to abandon an attachment proceeding and to grant a judgment *in personam* against a national bank:

> . . . We do not understand the court to hold, however, that the plaintiff could not maintain a suit on the complaint, or that the defendant could not confer jurisdiction by appearing and pleading to the complaint. Jurisdiction of attachment and of a suit upon a complaint is quite distinct; but inasmuch as the attachment was dissolved and dismissed, the defendant having answered the complaint and submitted to the jurisdiction of the court in that respect . . . *the court below had the right to proceed as if there had never been any attachment.*[53] (Italics added)

The procedure approved by the Alabama court does not defeat the operation of the federal statute. Under that procedure, the attachment suit is

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[51]Aldridge v. First Nat. Bank of Birmingham, 165 Miss. 1, 16, 144 So. 469, 471 (1932), in which the court stated: ". . . an appearance by a nonresident defendant may, under some circumstances, convert the proceeding into one in personam, but there is no contention here that the appellee's appearance was such as to have that effect."

[52]171 Miss. 282, 157 So. 349 (1934). In this case the court stated: "We reach the conclusion that the nonresident corporation, a national bank, not doing business in this state, did not . . . enter its appearance so that a personal judgment might be obtained against it . . . The effect of this federal statute is to deny the state's remedy, in so far as national banks are concerned . . . The motion to quash herein did not submit to the court jurisdiction of the appellant's person." *Id.* at 290, 157 So. at 351.

[53]Merchants' Laclede Nat. Bank v. Troy Grocery Co., 150 Ala. 128, 43 So. 208, 209 (1907).

abandoned, because of the federal statute, and the court proceeds on the original cause of action just as if the national bank had been brought in by valid process. The court does not attempt to impound the property of the national bank or maintain jurisdiction over the *res* in contravention of the federal statute. Instead, the court merely proceeds as if an *in personam* action had been brought against the national bank. This procedure should be followed in Mississippi under Section 1881.

To avoid entering a general appearance, the national bank should allow an attachment to isue on default and then enjoin the judgment or attack it collaterally. Should an attempt be made fraudulently to obtain jurisdiction of the national bank through the attachment action, the court should refuse to exercise jurisdiction so obtained.

*B. Against Nonresident Individuals and Corporations*

If an attachment proceding is brought in a county where neither the resident garnishee nor the nonresident defendant have property, there is no *res* within the territorial limits of the court on which to exercise its power. This was the problem presented in *Estes v. Bank of Walnut Grove*.[54] Unknown to the plaintiff, the resident garnishee had changed its domicile from the county where the suit was brought to another county in the state. The Mississippi court stated that the court in the county where the suit was brought did not have "territorial jurisdiction" of the resident garnishee or nonresident defendant.[55] This may be true of the nonresident defendant so long as he does not come within the court's "territorial jurisdiction." It is not true, on the other hand, that the court lacked "territorial jurisdiction" of the resident garnishee. The *res,* being a debt, would not be within its "territorial jurisdiction," until such time as the resident garnishee made an appearance.[56] An appearance by the resident garnishee, therefore, submitted both the *res* and his person to the court's jurisdiction for all purposes. The action was not in the proper venue, but removal to the proper venue was a personal privilege of the defendants. If the privilege to object to improper venue is waived the

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[54]172 Miss. 499, 159 So. 104 (1935).

[55]Estes v. Bank of Walnut Grove, 172 Miss. 499, 513, 514, 159 So. 104, 107 (1935), wherein the court also stated: "It therefore follows that there was no *territorial jurisdiction* of the . . . [resident garnishee or nonresident defendant] in Holmes County, and the court below so held." (Italics added)

[56]Harris v. Balk, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023, 3 Ann.Cas. 1084 (1905).

court has jurisdiction (power) to proceed to a valid judgment.[57] An appearance by both defendants through a motion to quash, under Section 181, should have enabled the court to render an *in personam* or *in rem* judgment at the next term of court. The court, however, did not reach that conclusion.

In *Alabama Power Co. v. Jackson*[58] two nonresident individuals, invited into the state to fish, were served with process in an attachment proceeding. They appeared specially "to object to the jurisdiction of the court" because (1) under the attachment statute nonresidents should not be garnishees, and (2) they were fraudulently brought into the jurisdiction. The court allowed the special appearance on the first ground. The court permitted another garnishee, a foreign corporation qualified to do business in the state but in a county other than where the suit was brought, to appear specially on the ground that process on it could not confer jurisdiction since process had not been perfected against a garnishee residing in the county where the suit was brought. The nonresident debtor, a foreign corporation, also was permitted to appear specially to object to the court's jurisdiction because it was not doing busines in the state. Since the application of Section 1881 should obtain the same result in all three instances, only its effect on the two nonresident individuals will be considered in detail.

The court did not need to construe the words of the attachment statute—"persons in this state who have in their hands effects of . . ."[59]—to mean "persons *resident* in this state." Such construction did render the process void, but even if the process was void the very purpose of Section 1881 was to convert any such objection to the court's jurisdiction into a general appearance. Although process may have been void, the nonresident individuals, having appeared, should have been in court for all purposes.[60] To avoid this result, the garnishees should have al-

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[57]In Wilson Cypress Co. v. Logan, 115 Fla. 845, 156 So. 286, 287 (1934), the court stated: ". . . wherever a defendant is sued in a county other than that designated in the statute and files a general appearance and thereafter goes to trial upon issue joined without objection to the jurisdiction and venue, the [venue] statute will be deemed to have been waived and the court to have acquired jurisdiction of the parties." *See* Fitzgerald v. Williams, 136 Miss. 250, 101 So. 370 (1924); *cf.* De Jarnette v. Dreyfus, 166 Ala. 138, 51 So. 932 (1910).

[58]181 Miss. 691, 179 So. 571 (1938).

[59]Alabama Power Co. v. Jackson, 181 Miss. 691, 702, 179 So. 571, 573 (1938).

[60]See note 14 *supra;* Citizen's Bank of Hattiesburg v. Grigsby, 170 Miss. 655, 155 So. 684 (1934). In Fisher v. Pacific Mutual Life Ins. Co., 112 Miss. 30, 32, 72 So. 846, 847 (1916) the court stated: ". . . regardless of whether the summons served on the insurance commissioner was sufficient to bring the defendant into court or not, for the reason that under . . . [Section 1881] when appellee appeared for the purpose of pleading to the jurisdiction of the court [over its person] it

lowed a judgment by default, which could be attacked collaterally or its execution enjoined.[61] The same reasoning should apply to the nonresident debtor corporation.

If the court desired not to exercise its jurisdiction, it might have done so on another ground; namely, that the court should not lend its aid where the plaintiff has deliberately used fraud, deceit, or trickery to bring the defendant within the court's territorial limits.[62]

Two recent cases show that this erroneous doctrine of a special appearance in attachment has taken a firm hold upon the court. In the first, the court stated that "although the insurance company, by its motion to challenge the jurisdiction of the court, had appeared specially, there had been personal service of process upon it,"[63] and because of the personal service the bill should not have been dismissed. This seems to imply had there not been valid personal service on the nonresident but domesticated insurance company, there could have been a successful special appearance by motion to quash the process. In the second case, the court stated:

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then and there entered its appearance for all purposes, and by such action was only entitled to a continuance of the suit to the next term of court . . ." To the same effect, see Gulf Coast Motor Express Co. v. Diggs, 174 Miss. 650, 165 So. 292 (1935).

[61]In Finklea Bros. v. Powell, 189 Miss. 454, 461, 462, 198 So. 293, 294, 295 (1940), which involved an action against a partnership on a Louisiana judgment wherein the parties from Miss. had made a special appearance, the court stated: "The rule is that when a defendant has been sued in a state other than that of his residence and service has been attempted to be made on an alleged agent of the defendant, the latter may challenge the jurisdiction by one or the other of the following two courses: (1) He may disregard the suit; entirely stay away from the jurisdiction in which it is brought, and uuon the attempt thereafter to propound the judgment against him in a court of his residence or domicile, he may then raise, and have an adjudication, in the latter court, on the question whether the original court had jurisdiction. Or (2) he may appear specially, *in any of those jurisdictions where a special appearance is allowed,* and in limine challenge the jurisdiction . . .

"If he elect to take the second course above outlined, he will, in the absence of real fraud, be bound by the decision of the court in which the case was originally instituted, and he cannot have the jurisdictional question reviewed collaterally in the courts of his residence or domicile . . ." (Italics added)

It should be remembered that here the court is speaking of what the defendant might or should have done in Louisiana. If, however, this rule is applied to a nonresident sued in Mississippi, then number two must be considered in the light of Section 1881. Since there can be no special appearance under that section, no advantage can be gained by an attempted special appearance. For a misapplication of the second course, above, see the *Cudahy Packing Co.* case discussed in Part VI.

The *Finklea* case continued with this statement: "Special appearances, as recognized in most jurisdictions, have but little room for operation in this state . . ."

[62]Robinson v. Bossinger, 195 Ark. 445, 112 S.W.(2d) 637 (1938); Cameron & Co. v. Abbott, 258 S.W. 562 (Tex.Civ.App. 1924); 42 Am. Jur. 32-34.

[63]Ford v. Mutual Life Ins. Co., 194 Miss. 519, 529, 13 So.(2d) 45, 47 (1943).

> The nonresident corporations appeared specially and filed a plea to the jurisdiction on the ground that they were not . . . doing business in this state, and that since no attachment suit could be brought against the college [an institution of the State of Mississippi] . . . no such suit in the absence of the college could be maintained against the nonresident corporations. This a subject which has been so recently and so frequently examined and discussed that we say no further here than that in our opinion the bill was properly dismissed as to all the parties to it.[64]

Either Section 1881 does not mean what it says or the court has engrafted far-reaching exceptions in attachment cases against nonresidents. Since an attachment was found not to lie against the state college in the latter case, the court may have been justifed in refusing to exercise jurisdiction. But the holding that the court did not acquire jurisdiction of the nonresident's person upon appearance is difficult to justify. Again there is a failure to distinguish between lack of jurisdiction and having but refusing to exercise jurisdiction because of fraud, immunity, or comity.[65]

### VI. "DOING BUSINESS" BY FOREIGN CORPORATIONS

A doctrine appears to have developed in Mississippi that a foreign corporation can successfully enter a special appearance to object to the jurisdiction of the court over its person, provided it can establish that it is not "doing business" within the state. The "doing of business" by foreign corporations has been made a basis for jurisdiction under two statutes.[66] No attempt will be made to determine what acts constitute the "doing of business" within the state.[67]

The theories on which business or acts done within a state subject a foreign corporation to judicial process are: (1) that by the doing of

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[64]Smith v. Doehler Metal Furniture Co., 195 Miss. 538, 547, 15 So.(2d) 421, 422 (1943).

[65]Sessoms Grocery Co. v. International Sugar Feed Co., 188 Ala. 232, 66 So. 479 (1914); Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 119 La. 864, 44 So. 510 (1907); 14 AM. JUR. 372; 21 C.J.S. 140, 141.

[66]MISS. CODE ANN. (1942) §§ 1437 and 1438, 5345 and 5346. The latter sections have been codified since 1906 while the former were enacted in 1940. The fact that the first paragraph of the 1940 act pertains to *venue*, whereas the remainder of the act pertains to *jurisdiction* has added to the confusion that already exists in this state with reference to these terms. Although the wording of the 1940 act is broader, these statutes accomplish identical results.

[67]Note (1941) 13 MISS.L.J. 548; 14 AM. JUR. 382; 23 *id.* 490-498; 21 C.J.S. 114-116; Notes (1943) 146 A.L.R. 941, (1936) 113 A.L.R. 9, (1934) 95 A.L.R. 1478.

business the corporation is present in the state;[68] (2) that by its acts it has impliedly consented to the state's jurisdiction;[69] and (3) that "doing business" is for corporations a basis of jurisdiction *per se,* equivalent to presence in the case of individuals.[70] Historically the basis was estoppel or consent implied in law. If the jurisdictional basis is "doing business," process against a foreign corporation not doing business within the state would be void. How then, can a foreign corporation show that process is void, if it cannot appear specially? Like a nonresident natural person who has been served with void process, it may (1) allow judgment by default to be taken and attack it collaterally or enjoin its execution; or (2) appear before the court with a motion to quash the process.[71] If the nonresident person appears to quash process, under Section 1881 his appearance is entered to the succeeding term of court for all purposes.[72] The same should be true of the foreign corporation, even though it is not "doing business" within the state.[73] The "doing of business" within the state is a method now recognized to *bring* a foreign corporation within reach of the process of the state's courts. If the foreign corporation never appears but was "doing business" a valid judgment by default may be taken. If it enters a general appearance, the court has complete jurisdiction over the corporation's "person" by actual consent, a superior ground for jurisdiction, instead of consent im-

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[68]Bank of America v. Whitney Central Nat. Bank, 261 U.S. 171, 43 S.Ct. 311, 67 L.Ed. 594 (1922); Routenberg v. Schweitzer, 165 N.Y. 175, 58 N.E. 880 (1900).

[69]Morris & Co. v. Skandinavia Ins. Co., 81 F.(2d) 346 (C.C.A. 7th, 1936); 23 Am. Jur. 298-301; 21 C.J.S. 179.

[70]Francis, *The Domicile of a Corporation* (1939) 38 Yale L.J. 335, 350; Comment (1929) 42 Harv.L.Rev. 1062.

[71]See note 61 *supra.*

[72]Fisher v. Pacific Mut. L. Ins. Co., 112 Miss. 20, 72 So. 846 (1916); Standard Oil Co. v. State, 107 Miss. 377, 65 So. 468 (1914). The only possible exceptions are the attachment cases against nonresidents and the cases of "doing business" by foreign corporations, which are discussed herein under Parts V and VI. The other attempted "special appearances," discussed herein, do not amount to a "special appearance" under Section 1881. These appearances are to be justified on other grounds.

[73]In Cella Commission Co. v. Bohlinger, 147 F. 419, 8 L.R.A.(N.S.) 537 (C.C.A. 8th, 1906), the court stated: "But in the *absence* of consent to substituted service ["doing business"] and in the *absence* of property of the defendant in the state, which is the subject or object of the action [attachment suit], nothing short of service of a summons upon the defendant personally within the state, *or his appearance in the action,* constitutes that due process of law which will give the necessary jurisdiction to a court of the state to render a personal judgment against a nonresident." (Italics added)

In Gulf Coast Motor Express Co. v. Diggs, 174 Miss. 650, 165 So. 292 (1936) "doing business" was not raised, but in view of recent decisions by the court it is doubtful that the defendant was "doing business" within this state.

plied in law. After a corporation has appeared, under Section 1881, it should be in court for all purposes whether or not it is "doing business."[74]

Although the *Arnett* case, discussed in Part II, is the real source of the "doing business" exception, the first case in which the problem was presented clearly was *Cudahy Packing Co. v. Smith.*[75] In that case process was served on an alleged agent of the company, and a copy mailed to the main office in Chicago. Whether the Cudahy Packing Company of Maine or Louisiana was being notified could not be determined from the process. The court held the process ineffective against the Maine company. After assuming that the Company's failure to appear and object to lack of "territorial jurisdiction" was because such action would result in a general appearance under Section 1881, the court stated:

> . . . there is much in the general language of some of the earlier decisions to have given ground for that apprehension. But in Arnett v. Smith . . . it was definitely held that when the court has *not territorial jurisdiction* over a foreign corporation when and because not found doing business in this State, *the appearance of such a corporation to abate the action does not waive its immunity nor the lack of jurisdiction;* and . . . the appearances dealt with under . . . [Section 1881] have nothing to do with the right of a defendant to have a cause dismissed where the court is without jurisdiction of the subject matter, or where there is a *lack of territorial jurisdiction* . . .
>
> Inasmuch, therefore, as appellant could have appeared and raised in limine the question of territorial jurisdiction without thereby waiving its immunity, or the lack of such jurisdiction, appellant would be at liberty to take throughout the second alternative course, pointed out in Finklea Bros. v. Powell[76] . . . and since appellant has appeared by appeal in this Court and has thereby taken notice of the pendency of the action . . . wherefore any further notice of it . . . is not necessary to be given to appellant by summons, mailed notice or otherwise, we have stated . . . the pro-

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[74]Gridley, Maxon & Co. v. Turner, 179 Miss. 890, 176 So. 733, 177 So. 362 (1937); Gulf Coast Motor Express Co. v. Diggs, 174 Miss. 650, 165 So. 292 (1936).

[75]191 Miss. 31, 2 So.(2d) 347 (1941).

[76]See note 61 *supra.*

cedure to which appellant may avail itself on the remand . . .[77] (Italics added)

It is submitted that the "earlier decisions" expressed the correct rule under Section 1881, and that the above is a misapplication of the *Arnett* case. There was a recognized, valid immunity in the *Arnett* case. No immunity was involved in the *Cudahy Packing Co.* case. "Territorial jurisdiction" was not "waived" in the *Arnett* case, but the court should have based its refusal to exercise jurisdiction on the ground of immunity. Since the Cudahy Packing Co. did not have an immunity, it correctly refused to appear in the trial court. Instead, the Company attempted to accomplish a special appearance by an appeal from the trial court's judgment. As indicated by the court, this cured the defect in the process. How, then, can the Company follow the second alternative course pointed out in the *Finklea Bros.* case, namely to "appear specially, in any of those jurisdictions where a special appearance is allowed"?[78] Because of Section 1881, there should be no "second alternative course" in Mississippi. In the *Cudahy Packing Co.* case, therefore, since the Company had elected to chance an appearance instead of attacking the judgment by default collaterally, the court should have found that the Company submitted itself to the court's territorial jurisdiction and was there for all purposes.

*Lee v. Memphis Pub. Co.*[79] is generally noted for its strange holding that the publishers of the Commercial Appeal in Memphis, Tennessee, which conducts on a large scale every type of activity in Mississippi that it does in Tennessee (except publishing), is not "doing business" in Mississippi. With reference to the appearance of the Publishing Company to dismiss the suit for want of jurisdiction, the court stated:

> The defendant entered its appearance especially for the purpose of moving to dismiss the suit for *want of jurisdiction,* which action on its part did not operate as a personal appearance so as to subject it to the *territorial jurisdiction* of the court, as was held in the case of [citing an attachment case against a national bank] . . . By its

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[77]Cudahy Packing Co. v. Smith, 191 Miss. 31, 40, 41, 2 So.(2d) 347, 350 (1941). In connection with the procedure to be followed when the case is remanded, the recent case of Superior Oil Co. v. Smith, 29 So.(2d) 114 (Miss. 1947) presents a similar question. In this case the defendant allowed a judgment by default to be taken and, after such judgment, filed a petition in the trial court for an appeal, which was granted. The court found the process to be invalid, set aside the default judgment, and remanded the cause for further proceedings. Query, has not the defendant entered his appearance for all purposes?

[78]Finklea Bros. v. Powell, 189 Miss. 454, 461, 198 So. 293, 294 (1940).

[79]195 Miss. 264, 14 So.(2d) 351 (1943).

> plea, the defendant raised (1) the question of want of territorial jurisdiction of the courts . . . [because] it was not doing business . . . and (2) the want of venue of the suit in Webster County . . .[80] (Italics added)

The single authority cited, one of attachment against a national bank, is to be distinguished from an appearance by the Commercial Appeal in a libel action. The first part of the court's statement is in the teeth of Section 1881. The latter part of the statement also should have established a general appearance. Even in jurisdictions allowing special appearances, a plea to the want of venue constitutes a general apeparance.[81] *A fortiori,* under Section 1881, a plea to the want of venue should be general.[82]

Following the *Arnett* and *Lee* cases and without reference to Section 1881, the court in *Knower v. Baldwin*[83] allowed a foreign corporation not "doing business," whose traveling salesman had an automobile collision within the state, to appear specially. The opinion is subject to the same objections mentioned heretofore.

## VII. AMICUS CURIAE

An early Mississippi case[84] discussed the right of an attorney to appear *amicus curiae* to bring to the attention of the trial court some jurisdictional matter that would defeat the plaintiff's action. In *Columbia Star Milling Co. v. Brand*[85] a corporation and its president were co-defendants. An attorney entered the president's personal appearance, and then, without entering the company's appearance, was allowed to argue as *amicus curiae* that the company was not properly in court.

In a later case[86] an attorney appeared *amicus curiae* to show that a defendant was not the agent of a corporation but of a partnership. After

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[80]Lee v. Memphis Pub. Co., 195 Miss. 264, 267, 14 So.(2d) 351, 352 (1943).

[81]State v. Superior Court for Klickitat County, 113 Wash. 244, 193 P. 676 (1920); 4 C.J. 1361; 6 C.J.S. 59.

[82]That such is the rule in Texas, see Grayburg Oil Co. v. Piland, 300 S.W. 666 (Tex.Civ.App. 1927); Devereaux v. Rowe, 293 S.W. 207 (Tex.Civ.App. 1927).

[83]195 Miss. 166, 15 So.(2d) 47 (1943).

[84]Baird v. Georgia Pac. R. Co., 12 So. 547, 548 (Miss. 1893), wherein the court states: ". . . did the appearance of the defendant . . . by attorney, though expressly declared to be solely for the purpose of admonishing the court that the necessary steps had not been taken to confer jurisdiction and to move to dismiss the attachment . . . amount to a general appearance? As courts are always careful to avoid usurping jurisdiction, a suggestion from one in no way connected with the case (an amicus curiae) that its jurisdiction was wrongfully invoked, or was in danger of being exceeded, would be respected . . ."

[85]115 Miss. 625, 76 So. 557 (1917).

[86]J. A. Maloney & Co. v. Tatum, 134 Miss. 714, 99 So. 129 (1924).

the declaration was amended, the attorney asked for time to prepare a defense. The court held that this constituted an appearance (the latter act, not the former) and allowed judgment by default against the defendant for not having answered. The court apparently conceded that if the *amicus curiae* had only raised the jurisdictional question there would have been no appearance by defendant. It is difficult to understand how the *amicus curiae* can be the defendant's attorney for the latter motion and not his attorney for the former.

The appearance of the *amicus curiae* to question the trial court's jurisdiction is not a special appearance, within the meaning of Section 1881, but it accomplishes the same purpose. Due to the obvious possibilities of abuse, the appearance *amicus curiae* in the trial court should not be permitted to question that court's jurisdiction.

## Conclusion

The purpose of Section 1881 is to deny the right of any individual—resident or nonresident, natural or artificial—to enter a special appearance in any of the courts in Mississippi.[87] Since the statute converts the only real ground for a special appearance, i.e., to object to the court's jurisdiction over a party's person, into a general appearance at the next term of court, *only* a general appearance should be permitted in the state courts of Mississippi.

In applying Section 1881 to the cases that have arisen, the Mississippi court has developed two difficulties: (1) a failure to distinguish between not having jurisdiction and having jurisdiction but not exercising it because some privilege or immunity protects the defendant, or fraud or trickery was used to obtain jurisdiction of the defendant; and (2) a failure to recognize when a party has or has not made an appearance because the term "territorial jurisdiction" is used improperly. Territorial jurisdiction is not to be confused with "venue" or "jurisdiction of the subject-matter". In a few cases where there is some question of the court having "territorial jurisdiction" over defendant's person, the question is answered affirmatively when the defendant, whether natural or artifical, personally appears before the court.

Another factor which contributes to the erroneous allowance of special appearances arises from a misapplication of the "doing business by foreign corporations" statute. This statute merely adds another method to the list of methods whereby personal jurisdiction of a corporation

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[87]In Turner v. Williams, 162 Miss. 258, 262, 139 So. 606, 607 (1932) the court stated: "There is no such thing as a special appearance in the courts of this state."

may be obtained. The statute does not pertain to "venue" or "jurisdiction of subject-matter." This statute is only remotely related to the court's "territorial jurisdiction" in that if a corporation never does business within the state it could never be said to have brought itself within that state's "territorial jurisdiction". Despite the statute, there is no better ground for a court's jurisdiction to attach than when a person—natural or artificial—appears before the trial court through its lawful representatives. When this occurs, all other special grounds for obtaining person jurisdiction can be forgotten; provided, however, the person does not have some privilege or immunity or was not brought into court through fraud or trickery. Under Section 1881, any appearance before the courts of this state not within the exceptions should constitute a general appearance to the next term of court.

*George Schweizer*

## TAXATION OF ILLEGAL ACTIVITIES

Mississippi's "Black Market Liquor Tax"[1] has been widely criticized. Foremost among the criticisms is one based on the idea that the tax creates an anomaly in the law. How, the layman asks, can a government *tax* that which it *forbids?* This note does not purport to discuss the political or moral issues involved in the tax nor to determine its desirability from a social viewpoint. Its purpose is rather to point out that Mississippi does not stand alone in imposing taxes on certain illegal activities and to examine the reasoning by which courts in other jurisdictions have upheld the validity of such taxation.

The collection of taxes from illegal activities is not a practice of recent origin. The federal government and a great many states have derived income from activities prohibited by law over a long period of time. As early as 1814, the United States Supreme Court held that goods brought into the country illegally were taxable as imports and were subject to forfeiture for non-payment of the tax.[2] Subsequent federal decisions have reaffirmed the right of the national government to derive

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[1]Miss. Laws 1944, c. 139, §§ 1-8, MISS. CODE ANN. (Supp. 1946) § 10108-01. This statute imposes on persons in the business of selling or distributing any property or articles, the sale or distribution of which is prohibited by law, a tax of 10% of the gross proceeds of the selling price of such articles. Provision is made for the collection of the tax by the State Tax Collector, who may retain 10% of such collections, out of which shall be paid expenses incident to the enforcement of the act and his own compensation. It is interesting to note that another statute, in force in the state since 1910, provides for an assessment of a tax on liquor dealers in the amount of $500.00 each, for state, county, and municipality. See MISS. CODE ANN. (1942), § 2639.

[2]Harford v. United States, 8 Cranch 109, 3 L.Ed. 594 (U.S. 1814).

revenue from illicit activities. In *The License Tax Cases*[3] parties residing in states where the sale of liquor and the operation of lotteries were illegal challenged the right of federal agents to collect taxes imposed on such activities by act of Congress. The court upheld the constitutionality of the federal tax. In those cases, however, it is to be noted that the activities taxed were not prohibited by federal law.

After the passage of the National Prohibition Act[4] questions arose as to the right of the federal government to derive revenue from activities prohibited by act of Congress. One of these questions involved an interpretation of the Income Tax Laws of 1921. In *Steinberg v. United States*[5] it was argued that the definition of income in the act[6] did not include profits from the illegal sale of liquor. This argument was unavailing but there was a strong dissent in the case.[7] The United States Supreme Court later reaffirmed the right of the national government to subject to income tax gains derived from illicit liquor traffic.[8]

A second question concerned the right of the federal government to impose a tax directly on the liquor distilling business. This question came before the Supreme Court in the case of *United States v. Yuginovich*,[9] wherein the defendant had been indicted for failure to pay a distiller's tax imposed by a statute[10] in force prior to the passage of the National Prohibition Act. The court held that the tax could not be collected because the taxing statute had been repealed by the Prohibition Law,[11] but the right of Congress to tax activities prohibited by law was reiterated in the decision.[12] Probably as a result of the holding in the *Yuginovich* case, Congress passed an act in 1921,[13] providing that all laws in regard to taxation of intoxicating liquor in force when the

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[3]5 Wall. 462, 18 L.Ed. 497 (U.S. 1867).

[4]National Prohibition Act of October 28, 1919, c. 85, 41 STAT. 305.

[5]14 F.(2d) 564 (C.C.A.2d, 1926).

[6]Revenue Act of 1921, § 213(a). Gross income is defined as income derived from any business carried on for gain or profits, and income derived from any source whatever.

[7]Steinberg v. United States, 14 F.(2d) 564, 569 (C.C.A. 2d, 1926). "It is incredible to believe that it was intended that a bootlegger be dignified as a taxpayer for his illegal profit, so that the government may accept his money for governmental purposes as it accepts the money of the honest merchant taxpayer."

[8]United States v. Sullivan, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927).

[9]256 U.S. 450, 41 S.Ct. 551, 65 L.Ed. 1043 (1921).

[10]REV. STAT. § 3257.

[11]National Prohibition Act, Title II, § 35.

[12]"That Congress may under the broad authority of the taxing power tax intoxicating liquors notwithstanding their production is prohibited and punished, we have no question." United States v. Yuginovich, 256 U.S. 450,463, 41 S.Ct. 551, 65 L.Ed. 1043 (1921).

[13]Act Supplemental to the National Prohibition Act. (November 23, 1921) c. 134, § 5, 42 STAT. 222, 223.

National Prohibition Act was enacted should be and continue in force unless the provisions of such laws were directly in conflict with provisions of the prohibitory act. After passage of this law the Supreme Court upheld the indictment of a party for failure to pay the liquor tax.[14] In that opinion Mr. Justice Holmes made the classic remark, "of course Congress may tax what it also forbids."[15]

In accord with the federal decisions, a number of State Supreme Courts including Tennessee,[16] Michigan,[17] Ohio,[18] Arkansas,[19], California,[20] and Minnesota[21] have upheld the right of the state to tax liquor illegally produced or sold within the state. Taxes imposed on houses of ill-fame, maintained in violation of the law, have been sustained in several cases.[22] Other activities prohibited by law but still legally subjected to taxation include a loan business,[23] gambling devices,[24] and an agency for placing bets on horse racing.[25] Though it was stated in a Texas case[26] that the state could not levy a tax on a business prohibited by law, a later Texas decision upheld the collection of an occupation tax on oil illegally produced.[27] The decision in *Marks v. United States*[28] is one of many reported instances of indictments for manufacturing smoking opium without a license and bond, long after such opium was absolutely forbidden.

Some of the many and varied arguments advanced in attack on statutes taxing illicit activities, and the answers thereto, are worthy of consideration. One such argument is that a statute imposing a tax on an illegal practice is in conflict with a law prohibiting the practice.[29] This line of attack as to the existence of a conflict in the taxing law and the law prohibiting the activity was rejected in *The License Tax*

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[14]United States v. Stafoff, 260 U.S. 477, 43 S.Ct. 197, 67 L.Ed. 358 (1923).
[15]*Id.* at 260 U.S. 480.
[16]Foster v. Speed, 120 Tenn. 470, 111 S.W. 925, 22 L.R.A. (N.S.) 949 (1908).
[17]Youngblood v. Sexton, 32 Mich. 406, 20 Am.Rep. 654 (1875).
[18]Kernich v. McCleary, 103 Ohio St. 457, 134 N.E. 462 (1921).
[19]Arkansas v. Tucker, 45 Ark. 55 (1885).
[20]Gooderham and Worts v. Collins, 59 Cal. App.(2d) 309, 138 P.(2d) 785 (1943).
[21]State v. Funk, 27 Minn. 318, 7 N.W. 359 (1880).
[22]De Monte v. Pabst, 14 Ohio Dec. N.P. 97 (1903); Watson v. Biddle, 12 Ohio C.C.N.S. 238, 31 Ohio C.C. 578 (1909). These cases are cited in 118 A.L.R. 831 (1939).
[23]State v. Rombach, 112 Miss. 737, 73 So. 731 (1916).
[24]People v. Hedrick, 138 P.(2d) 757 (Idaho 1942).
[25]Benson v. City of Long Beach, 61 Cal.App.(2d) 189, 142 P.(2d) 440 (1943).
[26]Texas v. Texas Brewing Co., 106 Tex. 121, 157 S.W. 1166 (1913).
[27]State v. Humphrey, 59 S.W.(2d) 162 (Texas 1941).
[28]116 C.A.A. 250, 196 Fed. 476 (1912).
[29]Claunch v. State, 83 Tex.Cr.R. 382, 203 S.W. 891 (1918). The court held that a statute taxing intoxicating liquor was null and void as being in conflict with a subsequent prohibition law.

*Cases*[30] and by the Supreme Court of Tennessee in *Foster v. Speed.*[31] The opinion in the former case stated:

> There is nothing hostile or contradictory in the Acts of Congress to the legislation of the states. What the later prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction, and tend to the same result. It would be a judicial anomaly as singular as indefensible, if we should hold a violation of the laws of the state to be a justification for the violation of the laws of the union.[32]

In the Tennessee case it was held that the imposition of the tax upon an outlawed business was often more effective in suppressing it than statutes making it a criminal offense. The reasons given in support of this view were: (1) The greater certainty of the collection of the tax; (2) the difficulties attending the prosecution of the misdemeanor; and, (3) the fact that the enforcement of the two remedies is generally entrusted to different officers.

Cases decided in the states of Ohio,[33] Michigan[34], Louisiana,[35], North Carolina,[36] Massachusetts,[37] and Virginia[38] have also ruled that there is no inconsistency between taxing an article and prohibiting its production entirely.

A second argument frequently advanced against taxes on illegal activities is that the tax gives a license to carry on the prohibited business. Such a contention was overruled in an Alabama case[39] in which a statute imposing a license tax on punchboards, prohibited by the state constitution and by law, was challenged. The court stated that the object of a license was to confer a right that did not exist without the license. Since the statute questioned merely taxed the prohibited activity, without conferring any right or authority to carry it on, the law was valid in spite of the fact that it called for payment of a "license tax."

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[30]5 Wall. 462, 18 L.Ed. 497 (U.S. 1867).
[31]120 Tenn. 470, 111 S.W. 925, 22 L.R.A. (N.S.) 949 (1908).
[32]The License Tax Cases, 5 Wall. 462, 473, 18 L.Ed. 497, 501 (U.S. 1867).
[33]Conwell v. Sears, 65 Ohio St. 49, 61 N.E. 155 (1901).
[34]Youngblood v. Sexton, 32 Mich. 406, 20 Am.Rep. 654 (1875).
[35]State v. Moeling, 129 La. 204, 55 So. 764 (1911).
[36]State v. Smiley, 101 N.C. 709, 7 S.E. 904 (1888).
[37]Commonwealth v. Nickerson, 236 Mass. 281, 128 N.E. 273 (1920).
[38]Webster v. Commonwealth, 89 Va. 154, 15 S.E. 513 (1892).
[39]Casmus v. Lee, 236 Ala. 396, 183 So. 185, 118 A.L.R. 822 (1938).

A third and often used remonstration against such taxing statutes is to the effect that they lend countenance to the prohibited activity. A well-reasoned answer to this argument was stated thus:

> The idea that the state lends countenance to any particular traffic by taxing it, seems to rest upon a very transparent fallacy. It certainly overlooks or disregards some of the ideas that must always underlie taxation. Taxes are not favors—they are burdens—they are necessary, it is true, to the existence of government but they are none the less burdens and are only submitted to because of necessity . . . and the taxation of a thing may be and often is, when police purposes are had in view, a means of expressing disapproval instead of approbation of what is taxed.[40]

It was said in *Youngblood v. Sexton*[41] that there had been expressed a strong sentimental objection to the doing of anything by the state which seemed to lend countenance to a business which the objectors regarded as an evil in itself. The court reasoned, however, that the state had never shown a disinclination to make things morally and legally wrong contribute to the public revenue when justice and good morals required it. If the state were to act upon the idea of refusing to derive a revenue from such sources, it ought to refuse to accept fines for criminal offenses with the same emphasis that it would refuse to accept a tax from an illegal business. It was further stated that the tax was laid by way of discouragement and had the same general object in view as a fine.

A New Jersey case[42] held that a municipal ordinance imposing a license tax on an activity prohibited by state law was invalid in view of other provisions of the ordinance which provided for some regulation of the business. The court explicitly recognized the right of the municipality to tax illegal activities, but it was stated that the ordinance in question attempted to authorize the illicit business and was thus invalid.

A fourth proposition used in opposition to statutes taxing illicit activities is that such statutes are contrary to public policy. This argument was set forth in a West Virginia case,[43] in which it was stated that the criminal law was not enforced against the operators of gaming devices holding licenses, and that the statute had increased rather than lessened the pernicious practices. The license statute was thus declared

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[40]*Id.* at 183 So. 187, 118 A.L.R. 825.
[41]32 Mich. 406, 20 Am.Rep. 654 (1875).
[42]Singer v. First Criminal Ct., 75 N.J.L. 386, 153 A. 252 (1931).
[43]Thompson v. Hall, 104 W.Va. 76, 138 S.E. 579 (1927).

invalid as against public policy in that it tended to encourage crime and create disrespect for the criminal law. A similar objection, however, to a federal statute taxing activities prohibited by law was held invalid,[44] the court stating that the legislature, not the court, was the body which expressed the public policy and that it was only in the clearest cases that a court could properly impute disregard of principles of public policy to the legislature. Such objections, said the justice who rendered the opinion, were intended as a denial of the expediency or propriety of the taxing statute, of which propositions the courts could not take cognizance. It seems well settled that the payment of the license or occupation tax on an activity prohibited by law is no defense to a prosecution for engaging in the unlawful business.[45]

The validity of the "Black Market Liquor Tax" has not been challenged in Mississippi, perhaps because of the imposing array of judicial decisions upholding the right of the government to tax illegal activities. That right seems firmly established in American jurisprudence.

*Charles C. Jacobs, Jr.*

## Formation and Organization of a Private Business Corporation in Mississippi

The purpose of this note is to set forth a workable procedure which may be followed by the attorney who wishes to form a corporation under the general incorporation act of Mississippi. It is hoped that this material will serve as a practical aid to the members of the bar both by setting forth a procedure and by discussing briefly some of the potential problems which may be raised by subsequent litigation.[1]

Because of the lack of extensive industrial and commercial development in Mississippi in the past, the courts have seldom been afforded an opportunity to interpret the incorporation act. As industrial and commercial activity increases the need for interpretation of the incorporating statutes may be expected to increase proportionately.

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[44]The License Tax Cases, 5 Wall. 462, 18 L.Ed. 497 (U.S. 1867).

[45]State v. Caldwell, 3 La. Ann. 435 (1848); Glendinning v. Denver, 50 Colo. 240, 114 P. 652 (1911); The License Tax Cases, 5 Wall. 462, 18 L.Ed. 497 (U.S. 1867).

[1]For formation procedure in other states see Moses, *Formation of a Corporation under the Business Corporation Act of Louisiana* (1945) 19 Tul. L. Rev. 566; Schloener, *Practical Steps in Organizing a Corporation* (1933) 17 Marq. L. Rev. 274.

No attempt will be made in this note to discuss the special regulations imposed on certain types of business organizations such as Banks, Building and Loan Associations, Credit Unions, Burial Associations, Hospital Service Associations or Insurance Companies.

A functional approach to the problem of formation will be used to consider: (1) the filing of the articles and necessary reports; (2) the payment of taxes and fees; and (3) the sale of securities and making of attendant reports. These points will not be discussed under separate headings, but chronologically as the incorporators and the corporation are required to file such reports and to pay such taxes and fees.

The first step in the organization will be the preparation of the articles of incorporation or charter as provided by Section 5310.[2] An application for charter may be obtained upon request from the Secretary of State. This application form has each of the several items of information required by the statute numbered to correspond with the numbered items in the statute.[3]

Item (1 )of this statute requires the corporate title of the corporation be stated. Regulations concerning the use of a corporate name must be considered.[4]

Items (2) and (3) are self-explanatory.[5]

Item (4) requires a statement of the authorized capital stock with full particulars as to the class or classes thereof, including all their privileges and restrictions, and whether such shares have a par value or are without nominal or par value. The Code[6] also provides what types of stock are authorized for issue under the act. These provisions are sufficiently liberal to allow the promoters of corporations a fairly wide range in fitting the various classes of stock to the current demand of the investment market.[7] In this connection attention is invited to the con-

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[2]MISS. CODE ANN. (1942) § 5310. Unless otherwise indicated all code sections cited in this note refer to the Mississippi Annotated Code (1942).

[3]*Ibid.* It is to be noted that Mississippi does not require any special number of incorporators. Consequently a single individual may incorporate in this state. For a discussion of the one man corporation see Fuller, *The Incorporated Individual* (1938) 51 HARV. L. REV. 1373.

[4]*Id.* § 5322. This section provides that no corporation shall be created with the same name as that of an existing corporation organized in this state nor with a name so similar as to be misleading.

Section 5395 provides that no person, corporation, association or co-partnership except corporations formed under provisions of the Credit Union Act shall have any name or title which contains the words *Credit Union.*

Section 5155 provides that the words "bank" or "banking" shall not appear in the name of any institution which is not authorized by its charter to do a banking business.

[5]*Id.* § 5310. Item 2 requires the names and post office addresses of the incorporators be given, and item 3 provides for the domicile of the corporation.

[6]MISS. CODE ANN. (1942) § 5311.

[7]It is to be noted, however, that Mississippi gives no authority by statute for creation of stocks secured by mortgage as, for example, bonds convertible to preferred stock, the bond mortgage remaining in effect and securing the converted preferred stock. The rule is well settled that in the absence of such statutory provi-

stitutional requirement that all shares of stock both common and preferred must be allowed voting privileges in the election of directors.[8] This protection to the persons holding classes of stock other than "management" stock is more apparent than real. The constitution provides merely that each share shall have one vote multiplied by the number of directors. It does not provide any scale by which the par value or paid in value of no-par stock is given consideration. The incorporators, therefore, by the simple device of isuing the "management" stock at one dollar par value and the other stock at one hundred dollars per value may control with the "management" stock one hundred times as many votes as the "non-management" stock may control with the same capital investment. The same result could be obtained by issuing the management stock as no-par stock to be sold at a low price.

Item (5) requires a staetment of the sale price per share, if desired, of stock without par value and authority of the board of directors to fix or change such sale price, if such authority be desired. This provision for no-par stock is supplemented by another section.[9] The provisions of this paragraph relating to no-par stock and power of the directors with reference thereto are self-explanatory. It should be noted, however, that while item (5) of the statute requires a statement of the sale price of no-par stock and authority of directors in reference thereto, item (5) of the Secretary of State's application blank calls for, "the number of shares for each class and par value thereof." The information required by item (5) of the statute is not specifically called for in the application blank. This information should be included in item (5) of the application if no-par stock is authorized.

Item (6) requires the period of existence (not to exceed fifty years) to be stated.[10]

Item (7) provides for a statement of the purposes for which the corporation is created. The section then continues, "including a state-

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sions granting authority to issue such securities, preferred stock holders may not be treated as creditors and any contract which attempts to so treat them is void as against public policy. Augusta Trust Company v. Augusta, H. and G. R. Co. 134 Me. 314, 187 A. 1 (1936); Kingston Cotton Mills v. Wachovia Bank & Trust Co., 185 N.C. 7, 115 S.E. 883, 29 A.L.R. 251, also see cases cited 29 A.L.R. 254, 255.

[8]Miss. Const. of 1890 § 194.

[9]Miss. Code Ann. (1942) § 5311 (fourth paragraph).

[10]Miss. Code Ann. (1942) § 5325 provides that the limit of corporate succession shall be fifty years. Miss. Code Ann., 1942 § 5325 provides for the renewal of the charter under certain circumstances. Whether renewal under this section may be allowed so that the corporation remains in existence beyond the ninety-nine year limit set by Section 178 of the Constitution of 1890 is a question beyond the scope of this note.

ment that the rights and powers that may be exercised by said corporation in addition thereto are those conferred by the provisions of this act." This statement is printed into the application for charter provided by the Secretary of State. The powers of a corporation under this act are enumerated in Section 5325.

It has become the practice for draftsmen of corporate charters to include in this "purpose section" sweeping provsions covering all powers they can think of and concluding with some clause as, *and do all other acts that a natural person may do.* The courts have not interpreted such a provision so as to actually give the corporation all the powers which a natural person has in all matters, but have said the corporation has such power only to carry out its stated purpose or purposes.[11] *Purposes* and *powers* are not to be confused. The *purpose* of the corporation is the object for which it is formed, that is, the business it is organized to conduct. On the other hand the *powers* of the corporation are the means by which it may carry out its purposes. The powers ordinarily exercised in the usual course of business to carry out its stated purpose will be implied in the corporation even in the absence of statute.[12]

There is danger in a greatly detailed enumeration of powers. A too specific enumeration of those things which the corporation shall have power to do may lead the courts to interpret them so as to negative all powers not expressly conferred. But if no mention is made of the incidental powers conferred the court will imply to the corporation all those powers ordinarily incident to conducting the stated business.[13] It is submitted that a clause granting the corporation "all powers necessary to the exercise of its business" will be the safer method of assuring

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[11]Fremont National Bank v. Furgeson and Co., 127 Neb. 307, 255 N.W. 39 (1934). "It is undoubtedly true that a contract of a corporation, to be within its powers, must have some relation to the business of the corporation . . . and the provision (in its charter) that it may exercise all the powers which a natural person could is limited by the other provisions of the charter." Greene v. Middlesborough Town and Lands Co., 121 Ky. 355, 89 S.W. 228, 11 Ann.Cas. 888 (1905).

[12]Stevens, Handbook on the Law of Private Corporations (1936) § 52.

[13]Where not prohibited by the charter or statute, a corporation will have the same powers to carry out its business as an individual would have. Herrick v. Humphreys Hardware Co., 73 Neb. 809, 103 N.W. 685, 119 Am.St.Rep. 917 (1905). *See also* Cunningham Hardware Co. v. Gama Transportation Co., 4 Ala.App. 561, 58 So. 740 (1912); Davis v. Pacific Studios Corp., 84 Cal.App. 611, 258 P. 440 (1927); Illinois Central R. Co. v. City of Bloomington, 76 Ill. 477 (1875); Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co., 210 Ill. 26, 71 N.E. 22, 102 Am.St.Rep. 145 (1904); Wright v. Hughes, 119 Ind. 324, 12 Am.St.Rep. 412 (1887); Flaherty v. Portland Longshoremen's Benev. Soc., 99 Me. 253, 59 A. 58 (1904); Eureka Iron and Steel Works v. Bresnahan, 60 Mich. 332, 27 N.W. 524 (1886); Doty v. Am. Tel. and Tel. Co., 123 Tenn. 329, 130 S.W. 1053 (1910); State v. Clement Nat. Bank, 84 Vt. 167, 78 A. 944 (1911).

to the corporation those powers incidental to the conduct of its business.[14] This clause is desirable particularly because the Mississippi Code does not have a provision that a corporation "shall have all such powers as shall be necessary to the exercise of the powers so enumerated and given."[15] Instead item (7) provides "that the additional powers shall be those conferred by this act," and "the powers conferred by this act" are enumerated in Section 5325, which does not mention *incidental* powers. In view of these two statutes, omission of the suggested clause would appear to be an unwarranted risk of future litigation. If, however, the incorporators wish to authorize the corporation to do acts not usually done in the ordinary course of the business which the corporation is formed to conduct, these powers should be enumerated in the charter.[16] This enumeration may be set out in item (7) or on a sheet attached to and made a part of the charter.

Items (8) and (9) are self-explanatory.[17]

The second step in the organization is to forward the charter to the Secretary of State with the necessary recordation fee within six months of the last acknowledgment as required by statute.[18] The statute provides that the price of issuing non-par stock and the par value of stock with a par value shall determine the amount of the fee.[19] For example, assume that it is intended for a corporation to authorize 1000 shares of

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[14]Cunningham Hardware Co. v. Gama Transportation Co., 4 Ala.App. 561, 58 So. 740 (1912); Davis v. Pacific Studios Corp., 84 Cal.App. 611, 258 P. 440 (1927); Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co., 210 Ill. 26, 71 N.E. 22, 102 Am.St.Rep. 145 (1904); Wright v. Hughes, 119 Ind. 324, 12 Am.St.Rep. 412 (1887); Eureka Iron and Steel Works v. Bresnahan, 60 Mich. 332, 27 N.W. 524 (1886); Ellerman v. Chicago Junction Railways and Union Stock Yards Co., 49 N.J.Eq. (4 Dick.) 217, 23 A. 287 (1891); State v. Clement Nat. Bank, 84 Vt. 167, 78 A. 944 (1911).

[15]Stevens, Handbook on the Law of Private Corporations (1936) 214.

[16]These special powers are discussed in 19 Fletcher, Cyclopedia of the Law of Corporations (Permanent Ed. 1933) 54. Among those there recommended as necessary for insertion if the power is desired are: (1) power to purchase and hold stock in other corporations; (2) power to guarantee the obligations of other corporations. (The author submits that in this connection it is safer to specifically authorize all guarantee contracts and accommodation instruments which are for the benefit of the business, if such power is desired.); (3) power to acquire its own stock; (4) power to acquire and hold patents and trade-marks; (5) power to form subsidiaries; (6) power to conduct business and hold property in other states; (7) power to hold meetings without the state.

[17]Miss. Code Ann. (1942) § 5310. Item 8 provides for the number of shares of each class of stock necessary to be subscribed and paid for before the corporation shall commence business. Item 9 provides that if the charter be that of a street railway, telegraph or telephone company, a description of the line and points it will traverse must be given.

[18]Miss. Code Ann. (1942) § 5310. The problem of when corporate existence begins has been discussed at length in Roberds, *The New Corporation Act* (1929) 2 Miss.L.J. 179.

[19]*Id.* § 5313.

stock, 500 shares of common stock and 500 shares of preferred, each with a par value of $100 per share. The total capital stock authorized is equal to $100,000. By reference then to Section 5316, it may be determined that the fee for the first $5000 will be $20, plus $2 for each additional thousand, or $190, which plus the initial $20 equals $210 payable as a recordation fee.

If the promoters wish to authorize an additional 1000 shares without par value and do not fix in the charter any price at which they should be issued,[20] the corporation must deposit with the Secretary of State the maximum fee[21] required to be paid for recording a charter of incorporation. In such case the corporation may within thirty days after approval of the charter file a certificate with the Secretary of State showing the price at which the directors or stockholders have determined the stock to be sold. If no such certificate is filed the maximum fee will be considered the recordation fee.[22] Assume, however, that the corporation determines that the stock should be issued at $50 per share. The capital stock of the corporation is then $150,000 and the fee payable is $310.[23] The Secretary of State will then refund the corporation the difference between the maximum fee which was deposited and the actual fee of $310.

Probably the most important problem which will confront the incorporators upon approval of the charter will be the sale of the authorized stock unless the corporation is to be a closely held business without public sale of securities. If the incorporators do intend to sell such securities to the public, their attorney must examine the Blue Sky Law. If these securities are to be sold interstate or through the mails he must examine the federal Securities Exchange Act as well. This note will confine itself to the former class.

Section 5362 of the Mississippi Code requires every investment company[24] to file in the office of the Secretary of State a statement showing

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[20]If the issuing price be fixed in the charter the shares will be treated as having a par value of that amount for the purpose of determining the recordation fee.

[21]This maximum fee is five hundred dollars. MISS. CODE ANN. (1942) § 5316.

[22]MISS. CODE ANN. (1942) § 5314.

[23]Computed as follows: $210 payable on the $100,000 of stock with par value plus $100 ($2 per 1000 x 50) payable on the no-par stock.

[24]MISS. CODE ANN. (1942) § 5361. An investment company is defined by the act as follows: "Every person, corporation, co-partnership, company, or association, organized or which shall hereafter be organized in this state, whether incorporated or unincorporated, which shall either himself, themselves, or itself, or by or through others, sell or negotiate for the sale of any stocks, bonds or other securities issued by him, them or it, within the State of Mississippi shall be known for the purpose of this act as a domestic investment company."

in detail the plan upon which it proposes to sell such stocks, bonds, or other securities, a copy of all contracts or other instruments it proposes to make with or sell to its contributors or customers, and other matters. It is suggested, therefore, that the attorney consider these matters and do as much assembling and preparation of this statement (if one is to be required) as is possible even before approval of the charter. In connection with the plans for the sale of securities it shauld be noted that the expenses of promotion must not exceed twenty percent of the price at which the securities are to be sold as shown by the certificate filed with the Secretary of State.[25]

The Mississippi Blue Sky Act is very inclusive in its application.[26] However, the Code lists the persons or organizations to which the act is not applicable, the most important exception for our purposes being subsection (g).[27] Whether or not the Blue Sky Act will apply to the securities of the corporation should be determined and necessary preparations made if the act be applicable.

Upon receipt of the approved charter the statute provides that a copy of it shall be published once within thirty days after it is granted. Such publication must be in a newspaper in the county where the corporation is domiciled, or, if none is so published, in one or more newspapers published in the state and having a circulation in the county.[28] A copy of the charter must be filed in the office of the chancery clerk of the county in which the corporation is domiciled.[29] After the charter has been approved and a copy thereof published and filed as required the stock holders should meet to organize the corporation. The statutory provision covering such organization meeting is somewhat vague.[30] It provides:

> The first meeting of persons in interest, unless otherwise provided for, may be called by a notice published in some convenient newspaper for at least ten days before the time appointed for the

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[25]Miss. Code Ann. (1942) § 5370. Attorney's fees, charter fees, fee for certificate under this act, franchise tax, and postage stamps and stationary are not included in the computation of this twenty per cent.

[26]See definition of investment company quoted *supra* n. 27.

[27]Miss. Code Ann. (1942) § 5380 (g): "Stock, bonds, or other securities of a corporation for the sale of which no commission, salary, bonuses, or other promotion expenses (except attorney's fees, charter fee, franchise tax, stationery & postage stamps) is paid or incurred . . . are not within the purview of this act."

[28]Miss. Code Ann. (1942) § 5310. A problem arises as to the effect of failing to so publish the charter. For one solution see Roberds, *The New Corporations Act* (1929) 2 Miss.L.J. 179.

[29]Miss. Const. of 1890 § 189 and Miss. Code Ann. (1942) § 5324.

[30]Miss. Code Ann. (1942) § 5325.

> meeting, which notice shall be signed by one or more persons named in the charter; and the meeting when assembled, may proceed to organize the corporation.

It is not entirely clear whether the provisions of this section are mandatory or permissive. The solution may well depend on the interpretation of the phrase "unless otherwise provided." If this phrase means unless the organizers make some other arrangements, it cannot be said logically to be mandatory. If it is interpreted to mean unless otherwise provided in the charter, these provisions can be interpreted logically as mandatory. Even if the latter conclusion is reached, an argument may be sustained that the provisions are not mandatory in the sense that they must be followed in order to create a *de jure* corporation, but that they must be followed in order to give constructive notice of the meeting to subscribers and thus bind them on their subscription contracts.[31]

The corporation though organized may not begin operation until the amount of stock which was designated in the charter as necessary for the commencement of business shall be subscribed and fully paid for.[32]

If the Blue Sky Act is applicable to the sale of the corporate securities, the statement and other papers required by that act should be filed immediately with the Secretary of State.[33] Section 5363 establishes the required procedure for the filing of these papers and provides for a filing fee based on the monetary value of the securities to be sold. Upon the filing of the papers and the payment of the required fee, and after examination and approval by the Secretary of State, a certificate authorizing the sale of the securities will be issued to the person or corporation so filing.[34] Before the certificate may be issued the corporation must post the bond required by the act.[35]

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[31]For a general discussion of the organization meeting, its composition, purpose, and business there transacted see DORIS AND FRIEDMAN, CORPORATE MEETINGS, MINUTES, AND RESOLUTIONS (Rev. Ed. 1946) 184.

For an example of by-laws of a corporation, *id.* 193.

[32]MISS. CODE ANN. (1942) § 5310.

[33]*Id.* § 5362.

[34]*Id.* § 5366.

[35]MISS. CODE ANN. (1942) § 5367. "No such certificate shall be granted to such investment company, for the sale of its stocks, bonds or other securities, under the provisions of this Act until the applicants therefor shall have entered into bond for not more than one hundred thousand dollars, the same to be fixed by the Secretary of State, at not more than ten per cent. of the stock, bonds, or other securities, proposed to be issued by said investment company. The said bond shall be payable to the State of Mississippi, conditioned that the facts set forth in the application for such certificate, and the proof and statements offered to such Secretary of State, upon which application is based, are true, and that they will comply with the provisions of this Act in the sale of the stock, bonds or other securities of such investment company, or proposed investment company. Said bond may be made with individual

The statutes provide that a corporation must maintain an office in the county of its domicile, and if there are no officers of the corporation at such office, then a resident agent must be designated to accept service of process. A certified copy of the resolution designating such resident agent together with the written acceptance of the agent must be filed with the Secretary of State.[36]

Before commencing business a privilege license must be obtained if one is required for the type of business which the corporation intends to conduct.[37] Application for the license if it be a state-wide license[38] should be made to the tax commissioner or commissioner of insurance, unless the law provides that some other officer shall issue the license.[39] If the license required be a local privilege license[40] application should be made to the tax collector of the county where the business is located.[41]

Upon submission of the amount of the tax with the application[42] to the required officer a license will be issued. The license shall be valid for one year from the first of the month in which the application was submitted.[43] If the corporation intends to engage in more than one business for the pursuance of which a license is required, the corporation must pay the privilege tax imposed on each business in which it is so engaged.[44] In order to ascertain whether or not a certain type business is subject to a privilege tax, the State-wide Privilege Tax Code and the Local Privilege Tax Code must be consulted.

The corporation may begin actual business operations after compliance with these conditions. Within sixty days of its organization the

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sureties, or with a surety company authorized to do business in the State of Mississippi, such bond to be approved by the Secretary of State."

If a purchaser be induced to purchase any securities by false representations in the statements so filed concerning any material fact as to the securities, he may sue as provided in Section 5368.

[36]Miss. Code Ann. (1942) § 5319. When this office is in charge of its own officers, it (the corporation) is not required to designate a resident agent for service of process on it. Natchez Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931).

[37]Miss. Laws 1944, C. 138 § 3; Miss. Laws 1944 C. 137 § 3.

[38]Miss. Laws 1944, C. 138 § 1. "The term state-wide license when used in this act means a license . . . good and valid in each and every county in the state, unless otherwise limited . . .".

[39]Miss. Laws 1944, C. 138 § 45.

[40]Ops. Att. Gen. 1931-33, p. 165. "Local privilege licenses are valid only in the county where the business is located and it seems that if the corporation maintains establishments in more than one county, a license must be procured for each county."

[41]Miss. Laws 1944, C. 137 § 202.

[42]Miss. Laws 1944, C. 138 § 48; Miss. Laws 1944, C. 137 § 203. A duly authorized agent of the corporation must execute the application.

[43]Miss. Laws 1944, C. 138 § 49; Miss. Laws 1944, C. 137 § 204.

[44]Miss. Laws 1942, C. 138 § 50; Miss. Laws 1942, C. 137 § 205.

corporation must report such organization to the Secretary of State on a form prescribed by statute.[45] The incorporators will have received this form from the Secretary of State along with the application for charter.[46]

After the securities are sold, or if the corporation desires to cease the sale of its securities, it may make application to the Secretary of State to cancel the permit to sell the securities under the Blue Sky Law. The Secretary of State will then publish at the corporation's expense a notice to the stockholders of the company that said company has applied for a cancellation of its permit. The stockholders must file within three months from the date of the last such publication any complaint or claim against the corporation with regard to any alleged fraud or misrepresentation in connection with the sale of its securities.[47] The corporation, three years after such cancellation, may request the Secretary of State to cancel its bond, provided there is no claim not adjudicated. If there is such a claim, the corporation may request the Secretary of State in writing to investigate the claim and release the corporation if the Blue Sky Law has been complied with.[48]

If the sale of securities is not completed before December 31, the Blue Sky Act provides that during the month of January every company having a certificate of authority to sell securities in force must file a detailed statement in such form as the Secretary of State may provide showing the condition of the business.[49]

When the procedure described has been followed, all requirements for the formation of the corporation will have been satisfied. The only other annual report required in Mississippi is a tax return. The in-

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[45]MISS. CODE ANN. (1942) §§ 5320, 5321.

[46]*Id.* § 5321.

[47]*Id.* § 5369 *but see* § 5379: ". . . provided further, that should any investment company cease to sell any securities under its permit isued under this act, and desire to have its permit cancelled, such company may file with the Secretary of State a sworn statement of the president and secretary or any other two executive officers of the company so showing, and the Secretary of State may issue his certificate cancelling such permit as of such date." These two sections provide for two somewhat different procedures. They are respectively sections ten and twenty of Miss. Laws 1932, C. 88. It is believed that Section 5369 is controlling. That section is captioned "Cancellation of Permit" and provides solely for such cancellation procedure. On the other hand Section 5379 is captioned "Annual Statement" and provides primarily for said statement. The last clause quoted *supra* this note refers to cancellation of the permit. The two sections should be complied with so far as they are not inconsistent but where inconsistent, it is believed that Section 5369 is controlling.

[48]MISS. CODE ANN. (1942) § 5390.

[49]*Id.* § 5379. A filing fee of $2.00 must be paid with each annual report.

come and property taxes are not within the scope of this note. However, a brief discussion of the corporate franchise tax is deemed advisable. Every corporation organized under the laws of Mississippi must pay annual franchise tax based on its capital employed or used in Mississippi at the rate of $1.50 per $1000 of capital so employed or used.[50] The same tax is placed on foreign corporations doing business in the state.[51] This tax is payable on or before July fifteenth of each year based on the valued capital invested as of the close of the preceeding calendar or fiscal year. In case the fiscal year for which the tax is due ends on or before April thirtieth, the tax being due in July, the corporation's capital as of that date shall be the measure of the tax.[52]

If a corporation organized in Mississippi does business out of the state the capital basis for the tax payable to Mississippi is an adjusted one arrived at by applying a ratio to the total capital wherever employed. The ratio is the real estate, tangible personal property and gross receipts owned or received in Mississippi to the total real estate, tangible personal property and gross receipts wherever owned or received.[53] Thus if a Mississippi corporation with a total capital of $100,000 has $50,000 in real estate and tangible personal property in Mississippi and $26,000 outside Mississippi, and has gross receipts of $20,000 in Mississippi and $9,000 outside Mississippi, the adjusted capital on which it would pay tax to Mississippi would be $66,666.67.[54] Capital is defined by the act as the issued and outstanding capital stock, surplus and undivided profits including all reserves except those for definite known fixed liabilities which do not enhance the value of assets.[55]

It is believed that the members of the bar for whom primarily this note has been written will derive some benefit from having before them in functional form the process of organizing a private business corporation.

*Robert N. McNutt*

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[50] *Id.* § 9313.
[51] *Id.* § 9314.
[52] *Id.* § 9315.
[53] *Id.* § 9318.
[54] $105,000 (total tangible personal property, real property, and gross income received) is to $70,000 (tangible personal property, real property, and gross income received in Mississippi) as $100,000 (total capital) is to X (adjusted capital on which tax payable to state of Mississippi is based). X=$66,666.67.
Section 9318 provides further, "that in no case shall the determined capital in Mississippi be less than the assessed value of the real estate and tangible personal property in Mississippi."
[55] Miss. Code Ann. (1942) § 9317.

## RECENT DECISIONS

### Adjoining Landowners—Legality of Spite Fence—Materiality of Motive and Usefulness

Defendant, whose land adjoined plaintiff's land, erected a brick wall on his own property one and one half inches from plaintiff's dwelling completely obstructing one of plaintiff's windows. The wall was of no reasonable use to defendant, its only purpose being to "block off" plaintiff's window. Plaintiff seeks removal of this wall. Held: One has the legal right to erect a structure on his own land; his motive or the usefulness of the structure is immaterial. *Cohen v. Perrino,* 355 Pa. 455, 50 A.(2d) 348 (1947).

The right of an occupant of a building to unobstructed windows and openings facing adjacent land was recognized in England at an early date.[1] This right was successfully defended by English lawyers under the doctrines of ancient lights[2] and of visible easement.[3] It would seem, since America derived its common law from England, that our courts would follow these theories or a related principle. Because of the predominant feeling in early America that a landowner's rights should not be unduly encumbered, however, the English doctrines were not adopted.[4]

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While the courts are uniform in their holding that no action exists where both usefulness and good faith are present,[5] a split of authority occurs where either,[6] or both[7] are absent. The principal case falls into the category where both usefulness and good faith are absent, and agreeing with the older line of authority awards no action. The argument advanced is that if a man can obstruct light and air by exercise of a legal right[8] the existence of a bad motive will not convert the act into a civil wrong.[9] The more recent line of authority gives an action,

[1]Sury v. Pigott, 3 Q.B.D. 105, 6 App.Cas. 740 (1626).

[2]A user acquired a right to unobstructed light and air through windows or openings remaining in the same place for twenty years. Sury v. Pigott, *supra* note 1. *See* Note, 46 Am.Dec. 578 (1847).

[3]A purchaser of a building acquired an implied easement of light and air entering the windows and openings from the adjoining land of the vendor. Palmer v. Fletcher, 1 Lev. 122, 83 Eng.Rep. 329 (1663); Pollard v. Gare, 1 Ch. 834 (1901). *See* Note, 56 A.L.R. 1138, 1139 (1928).

[4]Guest v. Reynolds, 68 Ill. 478 (1873); Cummins v. Grines, 41 Ind.App. 367, 83 N.E. 1023 (1908). Notes, 22 L.R.A. 536 (1893); 56 A.L.R. 1138, 1140 (1928). The note in 56 A.L.R. 1144 cites New Jersey as the only state sustaining the doctrine of visible easements. Blumberg v. Wess, 129 N.J.Eq. 34, 17 A.(2d) 823 (1941) cites previous New Jersey cases and states that New Jersey no longer follows decisions that give an action under the doctrine of visible easements. However, an implied easement because of real necessity for light and air was sustained in: Lane v. Flautt, 176 Md. 620, 6 A.(2d) 228 (1939); Turner v. Tompson, 58 Ga. 268 (1877). Also approved by dictum in several states including Mississippi. Binder v. Weinberg, 94 Miss. 871, 824, 48 So. 1013 (1909).

[5]De Mers v. Graupner, 186 Ark. 214, 53 S.W.(2d) 8 (1932); Ash v. Tate, 64 App.D.C. 9, 73 F.(2d) 518 (1935); Bixby v. Cravens, 570 Okla. 119, 156 P. 1184 (1916).

[6]A fence erected for spite but nevertheless useful is not actionable. Green v. Shick, 194 Okla. 491, 153 P.(2d) 821 (1944). *Cf.* Letts v. Kessler, 54 Ohio St. 73, 42 N.E. 765 (1896) usefulness was not material; Burke v. Smith, 69 Mich. 380, 37 N.W. 838 (1888) malice made a difference; *cf.* Koblegard v. Hale, 60 W.Va. 37, 53 S.E. 793 (1929) malice made no difference.

[7]Daniel v. Birmingham Dental Mfg. Co., 207 Ala. 659, 93 So. 652 (1922). *Contra* Dallar Land and Loan Co. v. Garrett, 276 S.W. 471 (Tex.Civ.App. 1925).

[8]Metzer v. Hochrein, 107 Wis. 267, 83 N.W. 308 (1900).

[9]Letts v. Kessler, 54 Ohio St. 73, 42 N.E. 765 (1896).

saying that the privilege to own and control property implies a duty in the owner to respect the equal rights of others,[10] and therefore the owner of property is not permitted to use it for the sole purpose of inflicting malicious injury upon his neighbor.[11]

Statutes passed in many states declare that a structure kept for the purpose of injuring the property of an adjoining landowner is actionable;[12] however, they require that spite must have been the dominant motive in erecting the structure.[13]

The question has not been decided in Mississippi.[14] Since 1900, however, the trend in other American jurisdictions has been to allow an abatement of a structure serving no useful purpose and maliciously erected to block off light and air from adjoining property.[15] It is submitted, therefore, that the principal case is out of line with the more recent authorities, which, considering the complexities of modern society, represent the better view.

*Homer Lee Howie*

## Constitutional Law—Due Process—Double Jeopardy—Right to Execute Death Sentence After First Attempt Fails

Attempted execution of convicted murderer was unsuccessful because of mechanical defect in electrical apparatus. Prisoner contended that subsequent electrocution would deny him due process of law guaranteed by Fourteenth Amendment to the Federal Constitution by placing him in double jeopardy[1] and subjecting him to cruel and unusual punishment,[2] and that his punishment would be more severe than that ordinarily inflicted, resulting in denial of equal protection of the laws.[3] Held, *inter alia* (5-4): Subsequent execution is legal. No denial of due process; convict is not placed in double jeopardy by the proposed execution. *State of Louisiana* ex rel. *Francis v. Resweber, Sheriff,* —U.S.—, 67 S.Ct. 374, 91 L.Ed. 359 (1947).

The court in the case cited assumed without deciding that "violation of the principles of the Fifth and Eighth Amendments, as to double jeopardy and cruel and unusual punishment, would be violative of the due process clause of the Fourteenth Amendment."[4] It then disposed of the question by holding that there was no double jeopardy or cruel and unusual punishment, and thus it became unneces-

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[10]Racich v. Mastorvich, 65 S.D. 321, 273 N.W. 660 (1937).

[11]Norton v. Randolph, 176 Ala. 391, 58 So. 283 (1912).

[12]California, Connecticut, Kentucky, Maine, Massachusetts, New Hampshire, New Jersey, Vermont, Washington, Wisconsin. Note, 40 A.L.R. 177, 181 (1896); 133 A.L.R. 691, 704 (1941).

[13]Wendling v. Kalfrat, 232 Ky. 842, 24 S.W.(2d) 909 (1930); Rideout v. Knox, 148 Mass. 368, 19 N.E. 390 (1889). Note, 133 A.L.R. 691, 708 (1940).

[14]Gwain v. Melmoth, 1 Free.Ch. 505, 506 (Miss. 1839-43) indicates that Mississippi at that early date would give an action for stoppage of light and air.

[15]Parder v. Harvey, 164 So. 507 (La.App. 1935); Hornsby v. Smith, 191 Ga. 491, 13 S.E.(2d) 20 (1941); Humphrey v. Mansbach, 265 Ky. 675, 97 S.W.(2d) 573 (1936); Dunbar v. O'Brien, 117 Neb. 45, 220 N.W. 278 (1938); Racich v. Mastrovich, 65 S.D. 321, 273 N.W. 660 (1937).

[1]U. S. Const., Amend. V.

[2]U. S. Const., Amend. VIII.

[3]U. S. Const., Amend. XIV.

[4]67 S.Ct. 374, 375, 91 L.Ed. 359, 361 (1947).

sary to decide whether violations of these provisions of the Fifth and Eighth Amendments would have been cognizable under the Fourteenth.

However, even in the event double jeopardy had been found, the court would not have been able necessarily to use that as a basis for determination that the state was thereby depriving relator of life without due process of law. It is well settled that the first eight amendments are not, by virtue of the Fourteenth, made prohibitions to the states, but apply only to the national government.[5]

The court has in various cases held certain of the rights guaranteed by the first eight amendments against encroachment by the Federal Government to be protected from state interference by virtue of the due process clause of the Fourteenth Amendment. Likewise, it has held others of these rights not thus to be guaranteed. Among those held to be within the clause are right to freedom of speech,[6] public assembly,[7] the press,[8] religion,[9] and the assistance of counsel in a capital case.[10] Held not to be within the clause are the protections against double jeopardy,[11] compulsory self-incrimination,[12] unlawful search and seizure,[13] the right to be tried only upon grand jury indictment,[14] right to a speedy and public trial,[15] trial by jury in civil suits involving over twenty dollars,[16] jury trial in criminal cases,[17] and the privilege of defendants accused of crime to be confronted by adverse witnesses.[18]

There is no hard and fast rule as to whether a given right is protected under the Fourteenth Amendment. The rationale which the court has used is whether or not the right is "implicit in the concept of ordered liberty,"[19] or a "principle of justice so rooted in the tradition and conscience of our people as to be ranked

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[5]Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 151, 82 L.Ed. 288 (1937); Gaines v. Washington, 277 U.S. 81, 85, 48 S.Ct. 468, 470, 72 L.Ed. 793, 795 (1928); Maxwell v. Dow, 176 U.S. 581, 20 S.Ct. 448, 44 L.Ed. 597 (1900).

[6]Provided for in U.S. CONST., AMEND. I. Held to be within the due process clause in De Jonge v. Oregon, 299 U.S. 353, 364, 57 S.Ct. 255, 260, 81 L.Ed. 278 (1937).

[7]*Ibid.*

[8]AMEND. I. Near v. Minnesota, 283 U.S. 697, 707, 51 S.Ct. 625, 628, 75 L.Ed. 1357 (1931).

[9]AMEND. I. Hamilton v. Regents of University of California, 293 U.S. 245, 262, 55 S.Ct. 197, 204, 79 L.Ed. 343 (1934).

[10]Powell v. Alabama, 287 U.S. 45, 71, 53 S.Ct. 55, 65, 77 L.Ed. 158, 84 A.L.R. 527 (1932).

[11]AMEND. V. Palko v. Connecticut, *supra,* note 5. Whereas in Kepner v. United States, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114, 1 Ann.Cas. 655 (1904), re-trial under the same indictment was considered double jeopardy within the meaning of the Fifth Amendment, the court in the Palko case indicated that where the criminal prosecution was by a state, re-trial under the same indictment, after a successful appeal by the state, was not prohibited by the Fourteenth Amendment.

[12]AMEND. V. Twining v. New Jersey, 211 U.S. 78, 105, 106, 29 S.Ct. 14, 53 L.Ed. 97, 109 (1908).

[13]AMEND. IV. Weeks v. United States, 232 U.S. 383, 398, 34 S.Ct. 341, 58 L.Ed. 652, 658, L.R.A. 1915B, 834, Ann. Cas. 1915C, 1177 (1914).

[14]AMEND. V. Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884).

[15]AMEND. VI. Gaines v. Washington, *supra,* note 5.

[16]AMEND. VII. Walker v. Sauvinet, 92 U.S. 90, 92, 23 L.Ed. 678, 679 (1876).

[17]AMEND. VI. Maxwell v. Dow, *supra,* note 5.

[18]AMEND. VI. West v. Louisiana, 194 U.S. 258, 261, 262, 24 S.Ct. 650, 48 L.Ed. 965, 969 (1904).

[19]Palko v. Connecticut, *supra,* note 5.

as fundamental."[20] One should look to see whether justice can still be done, even though the particular privilege be withdrawn. The court has said, for example, that compulsory self-incrimination might be allowed without thwarting the ends of justice, while this could not be said as to freedom of speech, called a fundamental right.[21]

As pointed out above, the guaranty against being placed twice in jeopardy has been held not to be within the due process clause of the Fourteenth Amendment. Since the penalty is being exacted here by the State of Louisiana, the double jeopardy provision of the Fifth Amendment would not seem to be applicable.

*Fred Witty*

## Constitutional Law—Due Process—Equal Protection—The "Blue Ribbon Jury"

The appellants, labor union leaders, were convicted by a special or so-called "blue ribbon jury"[1] in the state of New York of the crimes of conspiracy and extortion. The panel of jurors from which this particular jury was drawn was made up almost entirely of professional men, proprietors and managers of businesses, and clerical and sales workers. Laborers and women were systematically excluded from such special jury lists by action of the jury commissioners. Held (5-4): Such a jury selection abridges no right under either the due process or equal protection[2] clauses of the federal constitution. *Fay v. People of State of New York,* —U.S.—, 67 S.Ct. 613, 91 L.Ed. 1517 (1947).

The early English jurors were witnesses to the crime, being chosen for their knowledge of the circumstances of the criminal act rather than for their impartiality. Not until the close of the middle ages was the concept of dispassionate and indifferent jurors put into practice.[3] The federal constitution guarantees a "fair and impartial trial." The instant case involves the question whether a jury, to be fair and impartial, must draw its jurors from a cross-section of the community.

The Supreme Court will intervene where a statute, constitutional on its face,[4] is so administered as to deny a right granted by the federal constitution.[5] The

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[20]Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674, 90 A.L.R. 575 (1934).

[21]Palko v. Connecticut, *supra,* note 5.

[1]Statute in the state of New York authorizes, in cities of over one million inhabitants, a sifting of the general jury panel to provide a special jury panel for the trial of matters of great importance as well as the more highly publicized and more complicated cases. The sifting is designed to result in jurors of superior intelligence whose opinion is not likely to be swayed by public opinion. Such special jury may be had at the discretion of the judge, on motion of either attorney. It is authorized for use in both civil and criminal cases. N.Y.Laws 1901, c. 602.

[2]U.S. Const. Amend. XIV, § 1.

[3]1 Holdsworth, History of the English Law (4th ed. 1922) pp. 317-319.

[4]Hill v. Texas, 316 U.S. 400, 62 S.Ct. 164, 86 L.Ed. 1559 (1941); Smith v. Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84 (1940); Pierre v. Louisiana, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757 (1938); Norris v. Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1934). See also Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1879) (statute excluding negroes from juries); and Rogers v. Alabama, 192 U.S. 226, 24 S.Ct. 257, 48 L.Ed. 417 (1903) (state constitutional provision excluding negroes).

court, however, has been extremely reluctant to intervene in the administration of justice in the state courts.[6] Only when the state has invaded or denied some right deemed fundamental in criminal procedure has the court declared the action as going beyond the line which divides states' rights from federal control.[7]

While this dividing line is fairly certain in cases involving race discrimination, it becomes shadowy and elusive in a case such as this. A state may exercise considerable discretion in prescribing the qualifications of its jurors, and in so doing may make certain discriminations without usurping the rights guaranteed by the fourteenth amendment. It may exclude women,[8] certain classes such as doctors, lawyers and ministers[9] and those not meeting minimum educational requirements.[10] Consistently with the sixth and seventh amendments[11] trial by jury may be abolished altogether.[12]

A representative of each social group and economic or racial class obviously cannot be collected on the same jury. Indeed, an attempt at such representation is unnecessary.[13] To show a denial of due process because of exclusion of a group or class from the jury the appellant must show: (1) purposeful discrimination,[14]

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[5]Akins v. Texas, 325 U.S. 398, 89 L.Ed. 1692 (1944); Martin v. Texas, 200 U.S. 316, 26 S.Ct. 338, 50 L.Ed. 497 (1905); Smith v. Mississippi, 162 U.S. 592, 16 S.Ct. 900, 40 L.Ed. 1082 (1895).

[6]Hill v. Texas, 316 U.S. 400, 62 S.Ct. 164, 86 L.Ed. 1559 (1941); Smith v. Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84 (1940); Rogers v. Alabama, 192 U.S. 226, 24 S.Ct. 257, 48 L.Ed. 417 (1903); Carter v. Texas, 177 U.S. 442, 20 S.Ct. 687, 44 L.Ed. 839 (1899); Neal v. Delaware, 103 U.S. 370, 26 L.Ed. 567 (1880); Virginia v. Rives, 100 U.S. 313, 25 L.Ed. 667 (1879); Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1879).

[7]U.S. v. Wood, 299 U.S. 123, 57 S.Ct. 177, 81 L.Ed. 78 (1936); Franklin v. South Carolina, 218 U.S. 161, 30 S.Ct. 640, 54 L.Ed. 980 (1909); Gardner v. People, 199 U.S. 325, 20 S.Ct. 106, 50 L.Ed. 212 (1905); Brown v. New Jersey, 175 U.S. 172, 20 S.Ct. 77, 44 L.Ed. 119 (1899); Williams v. Mississippi, 170 U.S. 213, 18 S.Ct. 583, 42 L.Ed. 1012 (1897); Murray v. Louisiana, 163 U.S. 101, 16 S.Ct. 990, 41 L.Ed. 87 (1895).

[8]Commonwealth v. Welosky, 276 Mass. 398, 177 N.E. 656 (1931) *cert. denied* 284 U.S. 684, 52 S.Ct. 201, 76 L.Ed. 578 (1931); State v. Dreher, 166 Fla. 924, 118 So. 85 (1928) *cert. denied* 278 U.S. 641, 49 S.Ct. 36, 73 L.Ed. 556 (1928). For an exhaustive study of this question see Crozier, *Constitutionality of Discrimination Based on Sex* (1935) 15 B.U.L.Rev. 723, and cases collected thereunder.

[9]Rawlins v. Georgia, 201 U.S. 638, 26 S.Ct. 560, 50 L.Ed. 899 (1905).

[10]*See* Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1879).

[11]U.S. Const. Amend. VI, VII (granting jury trial in civil and criminal cases). Also see Crozier, *Constitutionality of Discrimination Based on Sex* (1935), 15 B.U.L.Rev. 723.

[12]Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937).

[13]Ruthenberg v. U. S., 245 U.S. 480, 38 S.Ct. 168, 62 L.Ed. 414 (1917) (socialists demand representation on jury); Bush v. Kentucky, 107 U.S. 110, 1 S.Ct. 625, 27 L.Ed. 354 (1882) (negroes); *accord,* Virginia v. Rives, 100 U.S. 313, 25 L.Ed. 667 (1879) "A mixed jury in a particular case is not essential to the equal protection of the laws."

[14]Akins v. Texas, 325 U.S. 398, 89 L.Ed. 1692 (1944); Smith v. Mississippi, 162 U.S. 592, 16 S.Ct. 900, 40 L.Ed. 1082 (1895); Martin v. Texas, 200 U.S. 587, 26 S.Ct. 338, 50 L.Ed. 497 (1905); *cf.* Norris v. Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1934); Virginia v. Rives, 100 U.S. 313, 25 L.Ed. 667 (1879). It now takes less evidence to prove that the exclusion was by reason only of race than it did in the earlier cases: Hill v. Texas, 316 U.S. 400, 62 S.Ct. 164, 86 L.Ed. 1559 (1941); Norris v. Alabama, *supra.*

(2) that his rights have been prejudiced thereby,[15] and generally (3) that he is a member of the race or clas excluded[16]. Apart from the cases involving race exclusion the appellant is granted the right only to a fair and impartial trial. Unless he can show unfairness and partiality the Supreme Court will consider his constitutional rights fulfilled.

There is no constitutional guarantee of a jury composed of a cross-section of the community, nor is there a federal statute authorizing such representation. Such a concept was not known in England, nor has it been accepted here.[17] It is true that the Supreme Court will require *federal* juries to be cross-sections of the communities in which they sit.[18] But they make such requirement as a matter of policy only, under their prerogative of setting the policy for administration of justice in the federal courts.[19]

In the principal case, while there was a showing that certain classes had been excluded from the jury panel, there was no proof of purposeful exclusion aimed at discrimination against the appellant. Nor was there a showing that the jury's action had been other than fair and impartial. The court quite appropriately limited the concept of a cross-section jury to the federal courts as a matter of policy, as distinguished from requiring its use in the state courts as a matter of right.

*William M. McGough*

## Corporations—Officer-Director Fixing Own Salary—Ratification

The president of a corporation cast the deciding vote when the board of directors fixed his salary by a vote of three to two. A subsequent stockholders' resolution ratified the action of the directors. This stockholders' resolution was adopted over the protest of the minority stockholders by voting the president's majority in

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[15]Williams v. Mississippi, 170 U.S. 213, 18 S.Ct. 583, 42 L.Ed. 1012 (1897).

[16]Rawlins v. Georgia, 201 U.S. 638, 26 S.Ct. 560, 50 L.Ed. 899, 5 Ann. Cas. 783 (1905).

[17]The cross-section concept appears for the first time in *Smith v. Texas,* 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84 (1940), a case tried in a state court. The Supreme Court held the appellant was entitled to a jury "truly representative of the community", though such language was unnecessary to the decision in that case. The phrase was picked up by Mr. Justice Murphy and cited in *Glasser v. U. S.,* 315 U.S. 60, 86 L.Ed. 680, 62 S.Ct. 457 (1941), and later in *Thiel v. Southern Pacific Co.,* 328 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181, 166 A.L.R. 1412 (1945), both *federal* cases; and the word "cross-section" was added, without limiting its application to the federal courts. The language was used again in *Ballard v. U. S.,* 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 195 (1946), where the court was careful to confine its discussion to the federal courts. Mr. Justice Jackson, who wrote the majority opinion in this case, was absent at the time of the first two decisions, but was present for the *Ballard* case. Since Mr. Justice Murphy follows substantially the same reasoning in his dissent here as he followed in his majority opinions in the cases cited, and since this was a 5-4 decision, an interesting conjecture presents itself that the court in the *Glasser* and *Thiel* cases had no intention, at the time, of limiting the cross-section concept to the federal courts.

[18]Ballard v. U. S., 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 195 (1946); Thiel v. Southern Pacific Co., 328 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181, 166 A.L.R. 1412 (1945); Glasser v. U. S., 315 U.S. 60, 86 L.Ed. 680, 62 S.Ct. 457 (1941).

[19]McNabb v. U. S., 318 U.S. 332, 87 L.Ed. 819, 63 S.Ct. 608 (1942).

stock. The minority stockholders sought to have the salary resolution declared *void.* HELD: The directors' order was *voidable* upon a cogent showing by the minority stockholders that the salary was excessive. The sequent ratification was not effective since it was passed by a vote of the shares owned by the president. *Landstreet v. Meyer,* 29 So.(2d) 653 (Miss. 1947)

In the absence of specific charter provisions to the contrary directors and corporation officers are not entitled to compensation for the performance of their ordinary duties.[1] They may, however, become entitled to compensation if they render extraordinary services.[2] When a corporation officer is entitled to compensation for extraordinary services the fixing of his salary is incidental to the right which the board of directors has in appointing him an officer.[3] Frequently, as in the instant case, the officer chosen is also a member of the board of directors. The following fact situations may then be presented to the courts: (1) an interested officer-director does not participate when the resolution fixing his salary is passed; (2) an interested officer-director votes on the resolution fixing his salary but his vote is not essential to the passage of the resolution; or (3) an interested officer-director casts a vote which is essential to the passage of the resolution.

Even though an interested officer-director does not participate when a resolution fixing his salary is passed the resolution is subject to careful scrutiny by the courts. It will be set aside if fraudulent or if the salary stipulated is grossly excessive.[4] This is because corporation directors are fiduciaries and have a duty to administer corporate affairs for the benefit of the stockholders.[5] The courts, however, use every effort to respect a fair opinion rendered by a majority of the corporation's directors. Therefore, the burden of proof is placed on the party

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[1]Finch v. Warrior Cement Corp., 16 Del.Ch. 44, 141 A. 54 (1928); Baltimore & Jamaica Trading Co. v. Dinning, 141 Md. 318, 118 A. 801 (1922); Winfield Mortgage & Tr. Co. v. Robinson, 89 Kan. 842, 132 P. 979 (1913); N.C.Agr. Credit Corp. v. Boushall, 193 N.C. 605, 137 S.E. 721 (1927); Alexander v. Equitable Life Assurance Soc. of U.S., 233 N.Y. 300, 135 N.E. 509 (1922); Security Sav. & Trust Co. v. Coos Bay Lumber & Coal Co., 219 Wis. 647, 263 N.W. 187 (1937).

[2]Wright v. McLaury, 81 F.(2d) 96 (C.C.A. 7th 1936); Kenton v. Wood, 56 Ariz. 325, 107 P.(2d) 380 (1940); Security Sav. & Trust Co. v. Dinning, 141 Md. 318, 118 A. 801 (1922).

[3]Upright v. Brown, 98 F.(2d) 802 (C.C.A. 2nd 1938); Ransome Concrete Machinery Co. v. Moody, 228 F. 29 (C.C.A. 2nd 1922); Stevenson v. Sicklesteel Lumber Co., 219 Mich. 18, 188 N.W. 449 (1922); Lewis v. Matthews, 146 N.Y.Supp. 424 (1914); Waite v. Windham County Min. Co., 37 Vt. 608 (1865).

[4]Calkins v. Wire Hardware Co., 267 Mass. 52, 165 N.E. 889 (1929); Stratis v. Andreson, 254 Mass. 536, 150 N.E. 832 (1926); Nahikan v. Mattingly, 265 Mich. 128, 251 N.W. 421 (1933); Seitz v. Union Brass & Metal Mfg. Co., 152 Minn. 460, 189 N.W. 586 (1922); Holmes v. Republic Steel Corp., 69 N.E.(2d) 936 (Ohio 1946); Gallin v. Nat. City Bank, 152 N.Y.Misc. 679, 273 N.Y.Supp. 87 (1934).

[5]Pepper v. Litton, 308 U.S. 295 (1939); Southern Pacific Company v. Henry L. Gogert, 250 U.S. 483 (1919); Italo-Petroleum Corporation of America v. Hannigan, 1 Terry (40 Del.) 534, 14 A.(2d) 401 (1940); Ellis v. Ward, 137 Ill. 509 (1890); American Central R.R. Co. v. Miles, 52 Ill. 174 (1869); Cheeney v. Lafayette, etc., R.R. Co. 68 Ill. 426 (1869); Calkins v. Wire Hardware Co., 267 Mass. 52, 165 N.E. 889 (1929); Stratis v. Anderson, 254 Mass. 536, 150 N.E. 832 (1926); Cosmopolitan Trust Co. v. Mitchell, 242 Mass. 95, 136 N.E. 403 (1922); Green v. National Advertising & Amusement Co., 137 Minn. 65, 162 N.W. 1056 (1917); Rugger v. Mt. Hood Elec. Co., 143 Ore. 193, 20 P.(2d) 412 (1933).

attacking such a salary resolution to show that the salary is so excessive and unreasonable as to be deemed fraudulent.[6]

When the interested officer-director votes on a resolution fixing his salary but his vote is not essential to its passage the resolution is not voidable if the salary is reasonable and the resolution is passed in good faith. The burden of showing that the salary is reasonable is placed upon the interested officer-director.[7]

When an interested officer-director casts a controlling vote or where his presence is necessary to make a quorum the courts are in sharp disagreement as to whether such a resolution is void, voidable per se, or merely voidable. The English rule which is followed in many American jurisdictions declares the resolution to be void from inception.[8] One court has said that the law characterizes the act of the director as fraudulent and whether he acted with fraudulent intent or in the utmost good faith is immaterial.[9] Under the American majority rule, however, the resolution is voidable per se.[10] Some American courts go even further and say that the resolution is merely voidable and will not be set aside if the interested officer-director shows that the salary is reasonable and that the resolution was passed in good faith.[11]

The last-mentioned American liberal view is followed by the principal decision in a somewhat modified form. The court did not consider the directors' resolution to be void or voidable per se. The resolution was merely voidable but the burden of proof was shifted to the complaining minority stockholders to show that the salary was so excessive as to be deemed extravagant.

A second problem is posed where, as in the principle case, a majority of the stockholders ratify a directors' resolution fixing the salary for an officer-director.

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[6]McQuillan v. Nat. Cash Register Co., 27 F.Supp. 639 (D.C.Md. 1939); Matthews v. Headley Chocolate Co., 130 Md. 523, 100 A. 645 (1917); Calkins v. Wire Hardware Co., 267 Mass. 52, 165 N.E. 889 (1929); Nahikian v. Mattingly, 265 Mich. 128, 251 N.W. 421 (1933); Holmes v. Republic Steel Corporation, 69 N.E.(2d) 396 (Ohio, 1946).

[7]Schnittger v. Old Home Consol. Min. Co., 144 Cal. 603, 78 P. 9 (1904); Proter v. Lassen Co., 127 Cal. 261, 59 P. 563 (1899); Clark v. American Coal Co., 86 Iowa 436, 53 N.W. 291 (1892); Tenison v. Patton, 95 Tex. 284, 67 S.W. 92 (1902); Leavitt v. Oxford & Geneva Silver Min. Co., 3 Utah 265, 1 P. 356 (1880); Budd v. Walla Walla Prtg. & Pub. Co., 2 Wash. T. 347, 7 P. 896 (1885).

[8]Hardee v. Sunset Oil Co., 56 F. 51 (C.C.S.D.Cal. 1893); Martin v. Santo Cruz Water Storage Co., 4 Ariz. 171, 36 P. 36 (1894); McNulta v. Corn Belt Bank, 164 Ill. 427, 45 N.E. 954 (1897); Bennett v. Klipto Loose Leaf Co., 201 Iowa 236, 207 N.W. 228 (1926); McKey v. Swenson, 232 Mich. 505, 205 N.W. 583 (1925); Abott v. Harbeson-Textile Co., 147 N.Y.Supp. 1031 (1914); Briggs v. Gilbert Grocery Co., 116 Ohio St. 343, 156 N.E. 494 (1927); Greathouse v. Martin, 91 S.W. 385 (Tex.C.A. 1906); Ravenwood, S. & G. Ry. Co. v. Woodyard, 46 W.Va. 558, 33 S.E. 285 (1899).

[9]McConnel v. Combination Min. & Mill Co., 31 Mont. 563, 79 P. 248 (1905).

[10]Davis v. Pearce, 30 F.(2d) 85 (C.C.A. 8th 1928); Mobile Land Imp. Co. v. Gass, 142 Ala. 520, 39 So. 229 (1904); Massoth v. Central Bus Corp., 104 Conn. 683, 132 A. 236 (1926); Lofland v. Cahill, 13 Del. Ch. 384, 118 A. 1 (1922); Bates Street Shirt Co. v. Waite, 130 Me. 352, 156 A. 293 (1931); Jones v. Morrison, 31 Minn. 140, 16 N.W. 854 (1893); Bjorngoard v. Goodhue County Bank, 49 Minn. 483, 52 N.W. 48 (1892); Booth v. Beattie, 95 N.J.Eq. 776, 118 A. 257 (1922); Purchase v. Atlantic Safe Deposit & Trust Co., 81 N.J.Eq. 344, 87 A. 444 (1913).

[11]Church v. Harnit, 35 F.(2d) 499 (C.C.A. 6th 1929); Albrecht v. Bellinger, 167 Wash. 95, 8 P.(2d) 983 (1932); Standard Furniture Co. v. Hotel Butler Co., 161 Wash. 109, 296 P. 153 (1931); Teft v. Schaefer, 136 Wash. 302, 239 P. 837 (1925).

If the original resolution is considered void from inception there can be no such ratification. If, however, the directors' resolution is considered voidable or even voidable per se it is subject to ratification by a majority of disinterested stockholders.[12] In this regard a conflict occurs when an interested officer-director, who is the majority stockholder, votes his stock to ratify the directors' order. Authority sustains the view that while such a ratification is open to attack by the minority stockholders it may nevertheless be upheld by the courts. It is said that a director stands in a fiduciary relation to the corporation but he does not occupy such a position when voting as a stockholder.[13] The minority stockholders are protected under this view in that most of the courts place the burden on the officer-director to show that the transaction is entirely fair, made in good faith, and for an adequate consideration.[14]

The principal decision deviates from the above-mentioned majority rule in holding that the directors' salary resolution could not be aided by the subsequent stockholders' ratification in which the interested officer-director voted his majority stock. Presumably this deviation was necessitated in the interest of justice since, as previously stated, under this court's modification of the American liberal view the minority stockholders had already been required to establish that the salary was excessive.

*John C. Webb*

## Criminal Law—Husband and Wife—May One Spouse Commit Larceny of the Individual Property of the Other?

Indictment of husband for larceny of wife's property quashed by lower court. Held: Reversed. Common law fiction of conjugal unity abrogated by Women's Emancipation Act. Hence, asportation is of the property of "another". *State v. Herndon,* 27 So.(2d) 833 (Fla. 1946).

At common law neither spouse could be guilty of larceny of the property of the other because one of the elements of the crime was the taking of the property of another.[1] The property of the wife became that of the husband[2] and the person

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[12]Bates Street Shirt Co. v. Waite, 130 Me. 352, 156 A. 293 (1931); United States Steel Corp. v. Hodge, 64 N.J.Eq. 807, 54 A. 1 (1903); Sotter v. Chamberlain, Care & Boyce, 209 N.Y.Supp. 258 (1925); Lewis v. Matthews, 146 N.Y.Supp. 424 (1914); Russell v. Henry C. Patterson Co., 232 Pa. 113, 81 A. 136 (1938); Neff v. Twentieth Century Silk Corp., 312 Pa. 386, 167 A. 578 (1933); Teft v. Schoefer, 136 Wash. 302, 239 P. 837 (1925).

[13]Windmuller v. Standard Distilling & Distributing Co., 114 F. 491 (C.C.D.N.J. 1902); Keough v. St. Paul Milk Co., 205 Minn. 96, 285 N.W. 809 (1939); Bjorngoard v. Goodhue County Bank, 49 Minn. 483, 52 N.W. 48 (1892); Booth v. Beattie, 95 N.J.Eq. 776, 118 A. 257 (1924); Hodge v. United States Steel Corp., 64 N.J.Eq. 807, 54 A. 1 (1903); Russell v. C. Patterson Co., 232 Pa. 113, 81 A. 136 (1911); Transportation Co. v. Beatty, L.R. 12 App.Cas. 589 (1887).

[14]Hyams v. Calumet & Hecla Mining Co., 221 F. 529 (C.C.A. 6th 1915); Garrett v. Reid-Cushion Land & Cattle Co., 270 P. 1044 (Ariz. 1928).

[1]Watkins v. State, 60 Miss. 323 (1882); State v. Banks, 48 Ind. 197 (1874); Walker v. Reamy, 36 Pa. 410 (1860); Overton v. State, 43 Tex. 616 (1875); Reg. v. Kenny, 2 Q.B.D. 307 (1877).

[2]Thomas v. Thomas, 51 Ill. 162, 165 (1869); Madden, Persons and Domestic Relations (1931) §§ 28, 31-33. See Bank of America v. Banks, 101 U.S. 240, 243, 25 L.Ed. 850 (1879) where the court said that the wife had no such interest in the personal property of the husband.

of the wife merged with that of the husband[3] (the doctrine of conjugal unity). Following these rules there could be no taking by one spouse of the property of the other.

Since the passage of the married women's acts[4] the decisions on this question have been conflicting. The majority of the courts today still follow the common law rule applicable to larceny[5]; yet, the married women's acts have swept away virtually all of the incidents which gave rise to the doctrines of unity of spouses and merger of property.[6] These courts reach the common law result by strict construction of the statutes, i. e., that the unity of spouses still remain,[7] and also on grounds of public policy—invasion of the sanctity of the family.[8] The trend today, as evidenced by the instant case, is away from the common law rule.[9] Courts following this trend base their decisions upon the following grounds: the married women's acts have erased the doctrine of conjugal unity;[10] it is against public policy to let a wrongdoer go unpunished;[11] the concepts of law are changing to concur with our modern social mores.[12]

The minority view seems to be the more logical and more in accord with our present ideas of equality of the sexes. This minority argues that the peace and unity of the family is already shattered if one spouse would steal from the other; that it would be against public policy to allow one marital partner to steal from the other with impunity; that there is no logical reason to withhold criminal liability when civil liability attaches. It seems that the ancient and outmoded doctrine of conjugal unity will not be completely abrogated, however, unless by legislation.

*Joshua M. Morse, III*

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[3]Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Kelso v. Tabor, 52 Barb.Ch. 125 (N.Y. 1867); Stokes v. Macken, 62 Barb.Ch. 145 (N.Y., 1861); Phillips v. Barnett, 1 Q.B.D. 436, 439 (1876).

[4]Miss. Code Ann. (1942) c. 3.

[5]State v. Arnold, 183 Minn. 313, 235 N.W. 373 (1931); Thomas v. Thomas, 51 Ill. 162 (1869); People *ex rel.* Troare v. McClelland, 146 Misc. 545, 263 N.Y.Supp. 403 (1933); Hefferman v. Milwaukee Mechanics Ins. Co., 33 Ohio 207, 169 N.E. 33 (1929). But even at common law an adulterous wife, who has feloniously taken her husband's property, could be guilty of larceny. State v. Banks, 48 Ind. 197 (1874); People v. Schuyler, 6 Cow. 572 (N.Y., 1827).

[6]Thompson v. Thompson, 218 U.S. 611, 615, 31 S.Ct. 116, 54 L.Ed. 1180 (1910). In People *ex rel.* Car v. Martin, 286 N.Y. 27, 35 N.E.(2d) 636 (1941), the court said that the married women's acts have so changed the relation of husband and wife that there are few remaining vestiges of the common law concept of the unity of husband and wife.

[7]State v. Arnold, 183 Minn. 313, 235 N.W. 373 (1931); Thomas v. Thomas, 51 Ill. 162 (1869); Walker v. Reamy, 36 Pa. 410 (1860); State v. Phillips, 85 Ohio St. 317, 97 N.E. 976 (1912).

[8]State v. Phillips, 85 Ohio St. 317, 97 N.E. 976 (1912).

[9]Hunt v. State, 72 Ark. 241, 79 S.W. 769, 65 L.R.A. 71 (1904); Beasley v. State, 138 Ind. 552, 38 N.E. 35 (1894); State v. Koontz, 124 Kan. 216, 257 P. 944, 55 A.L.R. 558 (1927).

[10]Hunt v. State, 72 Ark. 241, 79 S.W. 769, 65 L.R.A. 71 (1904); State v. Koontz, 124 Kan. 216, 257 Pac. 944, 55 A.L.R. 558 (1927).

[11]People *ex rel.* Rossiter v. Rossiter, 173 Misc. 268, 17 N.Y.Supp.(2d) 30 (N.Y. 1940).

[12]State v. Herndon, 27 So.(2d) 833, 835 (Fla. 1946).

## Criminal Law—When Does a Fact Tend to Incriminate Sufficiently to Be Within the Doctrine of Immunity?

X was ordered to testify before a legislative investigating committee. By statute, this committee had the power to compel all witnesses before it to testify; but the witnesses were granted immunity from criminal prosecution whenever any fact or act in their testimony would tend to incriminate them. X was later indicted and convicted for a crime in regard to which he had given the committee some information. All the elements of the crime were present, but X pleaded immunity to criminal prosecution. Held: A witness cannot be convicted of a criminal offense for which he has been compelled to give a material link in the chain of evidence. Defendant discharged. *Wheat v. State,* 30 So.(2d) 84 (Miss. 1947).

The Constitution of the United States provides that no person shall be compelled in any criminal case to be a witness against himself[1]; and similar provisions are provided in the constitution of nearly every state in the Union.[2] The Federal courts have held that in view of the constitutional provision, a statutory enactment compelling the giving of testimony by an accused must afford absolute immunity against future prosecution for the offense to which the testimony relates.[3] The Mississippi courts have held that this right should be liberally construed so as to give complete immunity from prosecution to a person whose constitutional rights may be affected.[4]

A witness who is questioned on facts which would incriminate him, not only has the right of refusing to answer a direct question as to the commission of the crime, but also has the right of refusing to testify to a fact which would *tend* to incriminate him. The courts differ, however, on the matter of ascertaining when a fact does or does not *tend* to incriminate. One line of cases follows the "indirect clue theory" and the other line of cases follows the "link theory".

Under the "indirect clue theory" any fact is sufficient to allow the use of the principle of immunity if it might, upon search, furnish indirectly a clue to a crime in which the witness is involved to any degree.[5] While this theory does have support, it is not as widely accepted as the "link theory". As this is the more lenient of the two theories, it has met with considerable opposition.[6]

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[1]U. S. Const. Art. V.

[2]Miss. Const. Art. III; 8 Wigmore, Evidence § 2252 (3rd ed. 1940) (8 Wigmore, Evidence § 2250-2284 gives an excellent discussion of the principle of immunity from self-incrimination).

[3]Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110 (1892); Brown v. Walker, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819 (1896).

[4]Tucker v. State, 128 Miss. 211, 90 So. 845, 24 A.L.R. 1377 (1922); Lucas v. State, 130 Miss. 8, 93 So. 437 (1922); Owens v. State, 133 Miss. 753, 98 So. 233 (1923); Hosey v. State, 136 Miss. 5, 100 So. 577 (1924); Tripplett v. State, 136 Miss. 320, 101 So. 501 (1924); Sudduth v. State, 136 Miss. 742, 101 So. 711 (1924); State v. White, 140 Miss. 245, 105 So. 500 (1925); Thornton v. State, 143 Miss. 262, 108 So. 709 (1925); State v. Billups, 179 Miss. 352, 174 So. 50 (1937); State v. Bates, 187 Miss. 172, 192 So. 832 (1940). These cases, in addition to showing strong approval of the principle of immunity from self-incrimination by the Mississippi courts, also show that the principle has been sustained by various methods of procedure. It appears that the question may be raised at any time—even by motion in arrest of judgment.

[5]Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110 (1892).

[6]Ward v. State, 2 Mo. 120 (1829); *In re* Jennings, 154 Ore. 482, 59 P.(2d) 702 (1936); 8 Wigmore, Evidence § 2261 (3rd ed. 1940).

Under the "link theory" a fact is within the immunity doctrine if it necessarily provides a link in a chain of evidence, which link is required to prove the commission of a crime by the witness.[7] The assumption is that the prosecution has means of establishing all the elements of the crime except this missing link. Disclosure of this missing link by the defendant, therefore, would be needed to complete the proof; and his own disclosure would thus essentially involve an incriminating fact.[8]

The principal case is a restatement of the "link theory", which has been part of our Mississippi law for many years. This theory provides a maximum of protection to the individual from those tyrannies which necessitated the inclusion of the principle of immunity into our law. At the same time, it permits a minimum of abuse from those individuals in our society who would take advantage of such a part of our law. The principal case follows the weight of authority both nationally and in Mississippi.

*Frank E. Shanahan, Jr.*

## Disbarment Proceedings—Their Nature—Who May Institute the Proceedings

Citizens filed a petition to have the respondent barred from practice in the Federal courts because of his failure to enforce the laws of the state as Commonwealth's district attorney. The court accepted jurisdiction. Held: Although the institution of this suit possibly was irregular, the grievance of the citizens became the cause of the judge when the court accepted jurisdiction. Respondent disbarred. *Wilbur v. Howard,* 70 F.Supp. 930 (E.D.Ky. 1947).

Superior courts have inherent power to discipline their officers either by suspension or by disbarment.[1] This power exists for the protection of the courts, the people, and the legal profession.[2] Disbarment proceedings are usually "in re" proceedings, instituted by the court upon complaint by either the local bar association,[3] another lawyer,[4] or an aggrieved client.[5] Courts sometimes institute such

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[7]Crum v. Brock, 136 Miss. 858, 101 So. 704 (1924).

[8]"It is obvious that unless the privilege of immunity is to remain an empty formula easily evaded, its protection must extend to each one of (the elements of the crime) taken separately as well as to the general whole." 8 Wigmore, Evidence § 2260 (3rd ed. 1940).

[1]*In re* Higgins, 194 Miss. 838, 13 So.(2d) 829 (1943); *In re* Steen, 160 Miss. 874, 134 So. 67 (1931); *Ex parte* Brown, 1 How. (2 Miss.) 303 (1836). The Court in the *Steen* case held that the Supreme Court had concurrent jurisdiction with the circuit and chancery courts over disbarment proceedings. The legislature soon afterward awarded exclusive original jurisdiction to the circuit or chancery court of the county in which the party whose interest is involved resides; however, "either party may appeal to the Supreme Court." Miss. Code Ann. (1942) § 8716.

[2]*Ex parte* Redmond, 156 Miss. 439, 125 So. 833 (1930); *Ex parte* Cashin, 128 Miss. 224, 90 So. 850 (1922).

[3]*In re* Higgins, 194 Miss. 838, 13 So.(2d) 829 (1943); *In re* Steen, 160 Miss. 874, 134 So. 67 (1931).

[4]Commonwealth v. Roe, 129 Ky. 650, 112 S.W. 683, 19 L.R.A.(N.S.) 413 (1908); State *ex rel.* Fletcher v. Hunter, 152 Tenn. 233, 276 S.W. 639 (1925). In the latter case the court decided that the attorney instituting the proceedings need not show that he had suffered direct personal injury, since every member of the bar was injured by the acts of the erring attorney.

[5]Lenihan v. Commonwealth, 165 Ky. 93, 176 S.W. 948, L.R.A. 1917B, 1132 (1915).

proceedings on their own initiative when notice of an attorney's misconduct is brought to the judge's attention by informal means.[6] That a proceeding to disbar an attorney is not a "suit" or an "action" in the usual sense of those words is universally conceded by the courts.[7] There is no party plaintiff with a private interest, the only private interest involved being that of the attorney charged.[8]

Although private citizens have heretofore been able to make informal complaint to the courts on the misconduct of the courts' officers, the citizens in the subject case took the unusual step of filing a formal petition to have the attorney disbarred. The court seems to have reasoned that even though the filing of the petition by the citizens in the nature of a civil suit against the respondent was irregular, this method of bringing the malpractice of the attorney to the attention of the court was as good as any other. The procedure would have been normal had the court dismissed the petition, instituted an investigation of the respondent through an attorney appointed by the court, and conducted a hearing as to the respondent's activities in an informal proceeding.

Although the Mississippi legislature has by statute set forth a procedure or method for disbarment proceedings,[9] the Court has held that this legislation does not prevent or exclude the use of other methods.[10] The Court has further stated that since disbarment proceedings are *sui generis,* the usual formal procedure need not be followed in such matters.[11] The only requirements for due process in disbarment proceedings recognized by the courts are that the attorney charged be given ample notice, and the charges against him be proven in a fair hearing.[12]

It is submitted that the principal case introduced a new method of instituting and conducting disbarment proceedings, which, under the decisions of the Supreme Court in the Mississippi cases cited herein, might be adopted by the Mississippi courts.

*C. Denton Gibbes, Jr.*

## Domestic Relations—Duty of Father to Support Minor Child—Means of Enforcement

Wife brought action to compel husband to provide for future support of minor children and herself. Husband abandoned them two years before and only provision made for their necessaries was a charge account at a grocery store. Evidence showed wife and children were improperly clothed and housed. Held: Pursuant to *statutory* authority an order for future support and maintenance shall be entered against the husband. *Commonwealth ex. rel. Slocum v. Slocum,* 51 A.(2d) 516 (Pa. 1947).

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[6]*In re* Keenan, 287 Mass. 577, 192 N.E. 65, 96 A.L.R. 679 (1934).
[7]State v. Peck, 88 Conn. 447, 91 A. 274, L.R.A. 1915A, 663, Ann.Cas. 1917B, 227 (1914).
[8]*In re* Keenan, 287 Mass. 577, 192 N.E. 65, 96 A.L.R. 679 (1934).
[9]Miss. Code Ann. (1942) § 8711.
[10]*In re* Higgins, 194 Miss. 838, 13 So.(2d) 829 (1943).
[11]*Ex parte* Cashin, 128 Miss. 224, 90 So. 850 (1922).
[12]*Ex parte* Cashin, 128 Miss. 224, 90 So. 850 (1922); *Ex parte* Latham, 161 Miss. 243, 136 So. 625 (1931); *In re* Keenan, 287 Mass. 577, 192 N.E. 65, 96 A.L.R. 679 (1934).

Duty of father to support minor child has been the subject of much litigation. The duty existed at common law;[1] however, a historical study of early English decisions does not clearly show the extent of the duty.[2] The later decisions concede that the duty exists;[3] the conflicts arise over the means of enforcing it. In suits at law by a tradesman[4] or mother[5] against the father for necessaries furnished the child the doctrine of "agency by necessity" is applied to allow recovery against the father. The statements in the early common law decisions referring to the duty as *moral* only still effect the courts of today, though now it is usually recognized as a *legal* duty.[6]

In spite of this recognition of the duty it is often a right without a remedy. The courts will not allow the child to recover in a suit against his parents[7] in the absence of statutory authorority providing such a remedy. Reasons given for not allowing the action are that suits by child against parent are against public policy,[8] that the doctrine of agency by necessity provides an adequate remedy at law,[9] or that the criminal laws afford sufficient protection to minors from the parent's wrongful acts.[10]

The situation prompting a child to institute such an action arises from the same need which gives rise to an action for separate maintenance by an abandoned wife. Many jurisdictions allow the wife an action for separate maintenance apart from a bill for divorce,[11] reasoning that there is a duty upon the husband to support his wife, there is no adequate remedy at law (even though the doctrine of agency by necessity is applicable here also),[12] and that therefore a

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[1]Rawlings v. Rawlings, 121 Miss. 140, 83 So. 146 (1919); Baker v. Baker, 169 Tenn. 589, 89 S.W.(2d) 763 (1935); East v. King, 77 Miss. 738, 27 So. 608 (1900); Lee v. Lee, 135 Miss. 865, 101 So. 345 (1924).

[2]18 MICH. L.R. 342, 14 ILL. L.R. 645; both comments contain a concise historical background of English and American decisions which bear on this point; also Huke v. Huke, 44 Mo.App. 308.

[3]Lee v. Lee, 135 Miss. 875, 101 So. 345 (1924); East v. King, 77 Miss. 738, 27 So. 608 (1900); Rawlings v. Rawlings, 121 Miss. 140, 83 So. 146, 1259 (1919); Baker v. Baker, 169 Tenn. 589, 89 S.W.(2d) 763 (1935); Amis, DIVORCE AND SEPARATION IN MISSISSIPPI, § 232; Madden, PERSONS AND DOMESTIC RELATIONS, § 110.

[4]East v. King, 77 Miss. 738, 27 So. 608 (1900).

[5]Lee v. Lee, 135 Miss. 865, 101 So. 345 (1924); Schneider v. Schneider, 155 Miss. 621, 125 So. 91 (1929); Russell v. Russell, 170 Miss. 364, 154 So. 881 (1934).

[6]Rawlings v. Rawlings, 121 Miss. 140, 83 So. 146 (1919); Baker v. Baker, 169 Tenn. 589, 89 S.W.(2d) 763 (1935).

[7]Rawlings v. Rawlings, 121 Miss. 140, 83 So. 146 (1919); Baker v. Baker, 169 Tenn. 589, 89 S.W.(2d) 763 (1935).

[8]Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891); Fortenberry v. Holmes, 89 Miss. 373, 42 So. 799 (1907).

[9]Rawlings v. Rawlings, 121 Miss. 140, 83 So. 146 (1919); Baker v. Baker, 169 Tenn. 589, 89 S.W.(2d) 763 (1935).

[10]MISS. CODE ANN. (1942) § 2087, refusal of parent to support minor child made a felony. Rawlings v. Rawlings, 121 Miss. 140, 83 So. 146 (1919); Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891); but see dissent of Etheridge J. in *Rawlings case*: ". . . placing of parents in jail does not clothe the body, nor satiate the pangs of hunger, . . .".

[11]Garland v. Garland, 50 Miss. 694 (1874); Wilson v. Wilson, 198 Miss. 334, 22 So.(2d) 161 (1945); Lang v. Lang, 70 W.Va. 205, 73 S.E. 716 (1912).

[12]East v. King, 77 Miss. 738, 27 So. 608 (1910).

court of equity has jurisdiction to decree maintenance independently of the statutes on divorce.[13] The Mississippi Court has gone even further and allows a chancellor to make orders relative to custody of minors at the close of a divorce action where divorce was denied both parties,[14] holding that a court of equity has jurisdiction of the matter independently of statute allowing the court to make the order upon granting a divorce.[15] Yet, where the minor brings a bill through his next friend the Mississippi Court has held that the power to order support is not within the general equity powers of the court, and to allow the remedy would be exceeding the authority given in divorce statutes.[16] This is the majority view.[17]

Duty of parent to support his minor child is recognized in this state, but in many instances it cannot be enforced in an action at law. Since the chancery courts cannot decree support at the prayer of the child it must in many instances remain an unenforcable duty. Pennsylvania has corrected this situation by the legislative enactment involved in the principal case.

*W. E. McIntyre, Jr.*

## Municipal Corporations—Liability for Torts of Policeman

Anderson, a policeman, was retained on the police force despite three instances of intoxication. He was required to carry a revolver at all times, on or off duty. Subsequently, while off duty and intoxicated, he fired on decedent and Murphy without provocation. Decedent was killed and Murphy wounded. Anderson's mental condition was thereafter diagnosed as psychosis due to alcohol. Under statute waiving state's sovereign immunity, decedent's administratrix and Murphy sued the city for Anderson's assaults. Held: City is liable for assaults of employee retained when danger to others might reasonably be anticipated. Whether retention constituted a danger is a jury question. *McCrink et al v. City of New York,* 296 N.Y. 99, 71 N.E.(2d) 419 (1947).

Tort liability of the state has been limited, historically, by the concept that the sovereign can do no wrong.[1] The logical result of this premise is that the state is immune to suit for the torts of its agents and employees. This proposition has been vehemently attacked by many writers and is at variance with the rule followed in France and numerous other foreign countries;[2] but, in absence of

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[13]Garland v. Garland, 50 Miss. 694 (1874); Wilson v. Wilson, 198 Miss. 334, 22 So.(2d) 161 (1945); Lang v. Lang, 70 W.Va. 205, 73 S.E. 716 (1912).

[14]Davis v. Davis, 194 Miss. 343, 12 So.(2d) 435 (1943).

[15]Miss. Code Ann. (1942) § 2743. *Davis* case, *supra* note 14, finds authority in Mississippi Constitution of 1890 § 159, granting equity powers to the court of chancery. Accord: Horton v. Horton, 75 Ark. 22, 86 S.W. 824 (1905); Dovi v. Dovi, 245 Wis. 50, 13 N.W.(2d) 585 (1944); Leibold v. Leibold, 158 Ind. 60, 62 N.E. 627 (1902). *Contra:* White v. White (Rhode Island) 36 A.(2d) 661 (1944), holding such not within general equity powers; Thomas v. Thomas, 250 Ind. 254, 95 N.E. 345 (1911), special statutory authority would be necessary to grant such jurisdiction.

[16]Rawlings v. Rawlings, 121 Miss. 140, 83 So. 146 (1919).

[17]Madden, Persons and Domestic Relations, § 99.

[1]Russell v. Devon County, 2 T.R. 67, 12 Eng.Rul.Cas. 694 (1788); Barry, *The King Can Do No Wrong* (1924) 11 Va.L.Rev. 349; Borchard, *Government Liability in Tort* (1924) 34 Yale L.J. 1, 129, 229.

[2]Borchard, *supra* note 1; Maguire, *State Liability for Tort* (1916) 30 Harv. L.Rev. 20, 22, 25; Riesenfeld, *The French System of Administrative Justice* (1938) B.U.L.Rev. 48; Uhlman and Rupp, *The German System of Administrative Courts.*

statutory limitations, it has remained tenaciously imbedded in our decisions. This immunity has been explained on several grounds: that all acts of the state must be lawful; that an agent of the state acts outside the scope of his authority when he commits a wrongful act; that a wrong committed by an entire people is patently absurd; that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience"; and that to allow such suits would place a burdensome drain on public funds.[3]

The immunity granted the state has not been extended to the municipal corporation, however, and specific statutory provision that the municipality may, as in Mississippi, sue and be sued, is general.[4] But the courts, with an eye to sovereign immunity, have limited this susceptability to suit by distinguishing governmental from private or proprietary functions of the municipal corporation and have relieved the municipality of liability for torts occurring in the performance of those functions found to be governmental.[5] Most jurisdictions have held the police function governmental; and while the police officer may be personally liable, the municipality is immune to suit. The policeman is said to be an agent of the people and not of the municipal corporation.[6]

Under this rule a city has been held immune to liability for the assaults of a policeman who was known to be a "vicious person";[7] for the unwarranted shooting of an innocent citizen by a policeman known to be "incompetent and vicious";[8] and for the assaults of a drunken police officer.[9] Private individuals and corporations, on the other hand, have been held liable for torts of employees who were known to be of a "dangerous and vicious nature,"[10] and for the assaults of drunken employees[11]—certainly analagous circumstances.

It appears, therefore, that the facts of the subject case might well result in liability for a private individual or corporation. The decision of the New York court that such will also result in liability for a municipal corporation is, however, a distinct minority position. Admittedly the controlling factor is the particular

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(1937) 31 ILL.L.REV. 847, 1043; Notes (1931) 44 HARV.L.REV. 432, (1931) 16 CORN.L.Q. 359. *Cf.* Fowler v. City of Cleveland, 100 Ohio St. 158, 176, 126 N.E. 72, 77 (1919).

[3]Russell v. Devon County, 2 T.R. 667, 12 Eng.Rul.Cas. 694 (1788); Hillman v. Anniston, 214 Ala. 522, 108 So. 539 (1926); Bourn v. Hart, 93 Cal. 321, 28 P. 951 (1892); Bartlett v. Columbus, 101 Ga. 300, 28 S.E. 599 (1897); Coolidge v. Brookline, 114 Mass. 596 (1874); Devers v. Scranton, 308 Pa. 13, 161 A. 540 (1932).

[4]MISS. CODE ANN. (1942) § 3396.

[5]Meridian v. Beeman, 175 Miss. 527, 166 So. 757 (1936); Roumbus v. Chicago, 332 Ill. 70, 163 N.E. 361 (1928); Broome v. Charlotte, 208 N.C. 729, 182 S.E. 325 (195); Haggerman v. Seattle, 189 Wash. 694, 66 P.(2d) 1152 (1937). *Cf.* Harllee v. Gulfport, 120 F.(2d) 41 (C.C.A. 1941); Pass Christian v. Fernandez, 100 Miss. 76, 56 So. 29 (1911).

[6]Phoenix v. Greer, 43 Ariz. 214, 29 P.(2d) 1062 (1934); McCain v. Andrews, 139 Fla. 391, 190 So. 616 (1939); Leckliter v. Des Moines, 211 Iowa 251, 233 N.W. 58 (1930); Jaliff v. Shreveport, 144 La. 62, 80 So. 200 (1918); Vinsel, *Liabilities of Municipal Corporations in Mississippi* (1931) 3 MISS.L.J. 298, 304.

[7]Lamont v. Stravanough, 129 Minn. 321, 152 N.W. 720 (1915).

[8]Bates v. McComb, 181 Miss. 336, 179 So. 737 (1938).

[9]McElroy v. Albany, 65 Ga. 387, 38 Am.Rep. 791 (1880).

[10]Cussack v. Ottinger, 245 N.Y. 95, 157 N.E. 872. *Cf.* Fletcher v. Baltimore & Potomac R.C., 168 U.S. 135 (1897).

[11]*In re* Sabbatino & Co., 150 F.(2d) 101 C.C.A. 2d 1945). *Cf.* RESTATEMENT, AGENCY (1933) § 245e; RESTATEMENT, TORTS (1934) §§ 307, 308.

statute waiving sovereign immunity.[12] Other states, in absence of such statute, have made limited progress in granting relief to those injured under such circumstances by drawing tenuous distinctions between governmental and private or proprietary functions.[13]

Until legislative action comparable to that of New York becomes general, the private individual who suffers unwarranted injuries at the hands of a police officer will find no redress in court from the governmental unit responsible for the presence of such armed person on the streets—and this despite the intoxication, viciousness or other incompetence of the policeman. It is respectfully submitted that the New York view is the better view on tort liability of the municipal corporation in that it allows the losses incurred in governmental activities to be distributed among the persons benefiting from that government rather than resting solely on the injured party.

*Lampkin H. Butts*

## Parent and Child—Right of Child to Maintain Action Against Third Person for Enticing Parent from Home

A tort action was brought by five minors against defendant for the alienation of their father's affections and for enticing him from home, thus depriving them of his support, paternal care, and the security of family life. Held: Minor children have a right to protect their relationship with their parents and thus are entitled to damages from one who has destroyed their family unit, depriving them of the support, affection, and guidance of the parent. *Johnson v. Luhman,* 71 N.E.(2d) 810 (Ill.App. 1947).

At common law, the husband could maintain an action against a third person for enticing a wife or child[1] away from home, or for the alienation of the affections of the wife or child. These actions were based on an actual or constructive "loss of services."[2] Unless this loss was shown, the action could not be maintained.[3] Eventually, the action for alienation of the affections of a wife

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[12]It is interesting to note the recent federal statute waiving immunity to suit for tortious acts of employees of the federal government. See 28 U.S. C.A. 921.

[13]Meridian v. Beeman, 175 Miss. 527, 166 So. 757 (1936); Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.(2d) 604 (1945); Evans v. Berry, 262 N.Y. 61, 186 N.E. 203 (1933). *Contra:* Bates v. McComb, 181 Miss. 36, 179 So. 737 (1938). For a detailed criticism of Meridian v. Beeman, *supra,* see Sykes v. Berwyn, 321 Ill.App. 440, 51 N.E.(2d) 589 (1943).

[1]At early common law the action was allowed only for the abduction of the eldest son, or heir-at-law, the action at that time being to recover for loss of the benefit of the heir's marriage rather than for loss of services. Barham v. Dennis, Cro.Eliz. 770, 78 Eng.Rep. 1001 (1600); Jones v. Tevis, 4 Litt. 25, 14 Am.Dec. 98 (Ky. 1923).

[2]Magee v. Holland, 27 N.J.L. 86, 72 Am.Dec. 341 (1858); Prosser, Torts (1941) 916; Note (1931) 72 A.L.R. 847.

[3]Under the "modern" theory of the action by parent for alienation of the child's affections, loss of custody is sufficient to support the action, the loss of services being regarded as an "outworn fiction." Howell v. Howell, 162 N.C. 283, 78 S.E. 222, 45 L.R.A. (N.S.) 867, Ann.Cas.. 1914A, 893 (1913); Pickle v. Page, 252 N.Y. 474, 169 N.E. 650, 72 A.L.R. 842 (1930); Restatement, Torts (1934) § 700. But mere alienation of affections alone is insufficient to support the action. Pyle v. Waechter, 202 Iowa 695, 210 N.W. 926 (1926); Miles v. Cuthbert, 122 N.Y.S. 703 (1909); Restatement, Torts (1934) § 699.

became based on the loss of "consortium,"[4] and the wife, upon statutory removal of her disability to sue, was also given a cause of action, inasmuch as she had the same right to consortium as did the husband.[5] But the child, having no right to the services or consortium of the parent, had no action for the alienation of a parent's affections, nor against a third person for enticing a parent from home.[6]

The frank recognition by the court in the principal case that the family unit is one in which *all* the members thereof have correlative rights and duties, and that the violation of such rights, both tangible and intangible, is susceptible of an action at law for damages, is a marked advance from the early common law.[7] However, the action of alienation of affections, where no other elements are present, has met with much disfavor in recent years, resulting in statutory prohibition of "heart-balm" litigation in some states.[8] The court in the principal case held that to deny the right of action asserted by plaintiffs would be in direct contravention to the following provision of the state constitution: "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property, or reputation."[9]

The majority of American courts hold that the child's right to support by the parent is a legal right,[10] as distinguished from the common law rule that such right was merely a moral one.[11] Therefore it would seem that the decision in the principal case could properly have been based on defendant's action in inducing the plaintiffs' father to breach this legal duty.[12] The court laid a broader basis for its decision, *i.e.*, defendant's destruction of plaintiffs' family unit. However, it is submitted that the court's decision was proper, even though

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[4]Winsmore v. Greenback, Willes 577, 125 Eng.Rep. 1330 (1745). The term "consortium" at common law included three elements: service, society, and conjugal affections. Guevin v. Manchester St. Ry., 78 N.H. 289, L.R.A. 1917C, 410 (1916).

[5]Noxon v. Remington, 78 Conn. 296, 61 A. 963 (1905); Haynes v. Nowlin, 129 Ind. 581, 29 NE. 389, 28 Am.St.Rep. 213, 14 L.R.A. 787 (1891); Bennett v. Bennett, 116 N.Y. 584, 23 N.E. 17, 6 L.R.A. 553 (1889).

[6]3 Blackstone Comm. 142 (1765); Green, *Relational Interests* (1934) 29 Ill.L.Rev. 484.

[7]See Pound, *Individual Interests in the Domestic Relations* (1916) 14 Mich. L.Rev. 177, 185.

[8]The following states, by statute, prohibit the action: Alabama, Colorado, Illinois, Indiana, Michigan, New Jersey, and New York. Vernier, American Family Laws (Supp. 1938) § 158. A prior decision of the Illinois Supreme Court held that the Illinois statute, as applied to action by husband for alienation of wife's affections, violated the state constitution. Heck v. Schupp, 394 Ill. 296, 68 N.E.(2d) 464 (1946). The court in the principal case stated that the rule enunciated in the *Heck* case also extended to the right asserted by plaintiffs in the principal case.

[9]Ill. Const. (1870) Art. II, § 19. See Miss. Const. (1890) Art. III, § 24 for similar provision.

[10]Kearney v. Kearney, 178 Miss. 766, 174 So. 59 (1937); Michaels v. Flach, 197 App.Div. 478, 189 N.Y.S. 908 (1921); Madden, Persons and Domestic Relations (1931) 383, 384. In Mississippi, failure of parent to support child under sixteen years of age is made a felony by statute. Miss. Code Ann. (1942) § 2087.

[11]See 39 Am.Jur. (1942) § 35.

[12]See Restatement, Torts (1934) § 876(b). See also Notes (1946) 162 A.L.R. 826, (1946) 59 Harv.L.Rev. 297.

contrary to common law,[13] inasmuch as the state constitution, as interpreted by the court, recognized the right and granted a remedy in such case.

*John K. Keyes*

### Real Property—Life Estates—Removal of Fixtures

Testator devised land to daughter for life with remainder in fee to testator's surviving children. Lessee, knowing that he was contracting with a life tenant, secured a lease for a term of years, stipulated that he should have the right to remove fixtures at end of the term, and built warehouses on the land. After the death of life tenant, in a suit between remaindermen for partition of the land, lessee sought to intervene and secure removal of the buildings he had erected, claiming that they were trade fixtures and, as such, removable within a reasonable time after the death of the life tenant. Held: The determination of lease by life tenant's death ended all interest of the lessee in the land and fixtures. *Haywood v. Briggs,* 41 S.E.(2d) 289 (N.C., 1947).

Fixtures are chattels annexed to realty so as to become a part thereof;[1] and as an aid in deciding whether a chattel has become such a part of the realty as to be a fixture, courts consider both the mode of attachment and character of the article, but most weight is given to the intention of the annexor.[2] A trade fixture, being an article annexed to realty by a lessee to aid in his business,[3] is usually removable within a reasonable time after lapse of the lease, as are domestic and ornamental fixtures and, in some instances, agricultural fixtures.[4]

Difficulty arises, however, when the above principles are applied to chattels annexed to property held under a life estate for the question as to whether a chattel is a fixture has arisen principally in relation with terms for years rather than life estates.[5] A life estate is an estate which cannot last longer than the life or lives or one or more human beings,[6] and the rules governing the determination of life estates are more stereotyped than other leaseholds. A life tenant may carve terms for years from his estate.,[7] but when he purports to lease an estate

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[13]In Daily v. Parker, 152 F.(2d) 174 (C.C.A. 7th, 1945) minor children were allowed recovery on facts similar to the principal case. The court stated, "because such rights have not heretofore been recognized, is not a conclusive reason for denying them." *Contra:* Morrow v. Yannantuono, 152 Misc. 134, 273 N.Y.S. 912 (1934), in which the mother was enticed away and child was denied recovery. See also Coulter v. Coulter, 73 Colo. 144, 214 P. 400 (1923) in which an adult son was denied recovery for alienation of the affections of his mother.

[1]Ochs v. Tilton, 181 Ind. 81, 103 N.E. 837, 838 (1914), Hurst v. J. D. Craig Furniture Co., 95 S.C. 221, 78 S.E. 960, 962 (1913).

[2]1 Tiffany, Real Property (3rd Ed., 1939) § 608, and cases there cited, note 54; Note (1922) 32 Yale L.J. 199.

[3]Ray v. Young, 160 Iowa 613, 142 NW 393 (1913). Buildings held to be trade fixtures in: Goodrich Rubber Co. v. Breland, 170 Miss. 117, 154 So. 303 (1934); Rogers v. Vanderbilt, 175 Ark. 977, 1 S.W.(2d) 71 (1928); Royce v. Latshaw, 15 Colo.App. 420, 62 P. 627 (1900); Allen & Co. v. Grissom, 90 N.C. 110 (1884); White v. Arndt, 1 Whart. 91 (Pa. 1836); Jones v. Shufflin, 45 W.Va. 729, 31 S.E. 975 (1898). Note (1943) 43 Col.L.Rev. 533. *Contra:* Ray v. Young, *supra.*

[4]2 Tiffany, *op. cit. supra* note 2, § 616.

[5]Restatement, Property (1936) § 122, *comment a.*

[6]1 Tiffany, *op. cit. supra* note 2, § 49; Restatement, Property (1936) § 18; 33 Am.Jur. *Life Estates* § 2.

[7]1 Tiffany, *op. cit. supra* note 2, § 59.

greater than an estate for life his lessee acquires, against the owner of a future interest, no right, power, privilege or immunity greater than that had by the life tenant.[8] When an estate for years is raised by a lease, the interest of the lessee in the land is determined by death of the lessor, and the expired lease cannot be continued or revived by the remaindermen, since they were not in privity with the deceased life tenant or his lessee.[9]

Extraction of a uniform rule as to time in which fixtures may be removed by lessee of a life tenant is difficult; but the rule that a lessee has a reasonable time after determination of his lease to remove fixtures has been decided adversely as to a lessee holding from a life tenant when the term ends because of death of the life tenant.[10] Furthermore, on ground that real property rules dominate both the rules as to fixtures and as to contracts, the weight of authority[11] supports the statement in *Demby v. Parse*[12] that when fixtures are of such character that in absence of contract they constitute a permanent accession to the estate, the tenant for life cannot, by contract with his lessee, so far bind the remaindermen as to authorize removal of fixtures by the lessee after termination of the life estate. The Ohio Court has similarly held: "The life tenant would have had no right to recover from the remainderman for improvements made during her possession under the life estate, and a party whose rights are derived from contract with life tenant is entitled to no greater right."[13]

Mississippi has not litigated the point decided in *Haywood v. Briggs, supra,* but there are many decisions bearing on the different phases of the case which give an insight into how it would probably be decided. Many Mississippi cases have supported the view, first, that a holder of a life estate in land can convey no more interest than his life estate,[14] and secondly, that the manifest intention that a fixture shall not become realty prevents the acquisition of characteristics of realty.[15] It is true that if one claiming title has no notice of a life estate and acts in good

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[8]RESTATEMENT, PROPERTY (1936) § 124.

[9]1 TIFFANY, *op. cit. supra* note 2, § 62.

[10]Haflick v. Stober, 11 Ohio St. 482 (1860); White v. Arndt, 1 Whart. 91 (Pa., 1836); Jones v. Shufflin, 45 W.Va. 729, 31 S.E. 975 (1898). 2 TIFFANY, *op. cit. supra* note 2, § 622. But *cf.* RESTATEMENT, PROPERTY (1936) § 122.

[11]See cases cited *supra* note 10. *Accord:* Stein v. White, 109 Ohio St. 578, 143 N.E. 124 (1924). Notes (1920) 6 A.L.R. 1513; 31 C.J.S., *Estates* Sec. 54. *Contra:* Ray v. Young, 160 Iowa 613, 142 N.W. 393 (1913).

[12]53 Ark. 526, 14 S.W. 899 (1890).

[13]Stein v. White, 109 Ohio St. 578, 143 N.E. 124, 126 (1924). See Note (1921) 35 HARV.L.REV. 86 (Concludes that if a fixture is personalty it remains so only while contract is in effect.)

[14]Leflore v. Flowers et al., 117 Miss. 682, 78 So. 513 (1918); Deanes v. Whitfield, 107 Miss. 273, 65 So. 246 (1914); Anglin v. Broadnax, 97 Miss. 514, 52 So. 865 (1910); Barrier v. Young, 96 Miss. 160, 50 So. 559 (1909). *But cf.* Whitfield v. Lyon, 93 Miss. 443, 46 So. 545 (1908).

[15]Layne Central Co. v. Gulf Coast Ice Co. et al., 171 Miss. 94, 157 So. 84 (1934); Waldauer v. Parks, 141 Miss. 617, 106 So. 881 (1925); American Laundry Machine Co. v. Citizens' Nat. Life Ins. Co., 107 Miss. 108, 65 So. 113 (1914); Winner v. Williams, 82 Miss. 669, 35 So. 308 (1903); McMath et al. v. M. Levy & Sons, 74 Miss. 450, 20 So. 9 (1896); Duke v. Shackleford, 56 Miss. 552 (1879); Tate v. Blackburne, 48 Miss. 1 (1873); Perkins et al. v. Swank et al., 43 Miss. 349 (1870). But *cf.* M. L. Virden Lumber Co. v. Sherrod, 167 Miss. 297, 139 So. 813 (1932).

faith in making improvements, he shall recover value of improvements made;[16] nevertheless, precedents exist which hold that if the claimant had notice of an outstanding life estate then, "The improvements put upon the lands by the defendant during the life of the life tenant passed to the remaindermen by the expiration of the particular estate . . ."[17] Consequently, it would seem that the Mississippi Court should analogize the facts of the instant case to the precedents mentioned, allow real property rules of life estates to take precedence over rules as to contracts or fixtures, and hold that lessee, having had *notice* of the life tenancy, would not be able to remove the fixtures even though an express intent to do so had been manifested by contract.

*Roland D. Marble*

## Searches and Seizure—General Exploratory Search as Incident to Arrest is not Unreasonable Under Edict of Fourth Amendment

Federal agents, under authority of warrant charging violation of mail fraud statute and transportation of forged checks in violation of National Stolen Property Act, arrested accused in the living room of his apartment, and made a general search of the entire apartment as an incident of the arrest. While searching adjoining rooms, they found altered draft cards hidden in an envelope in a bureau drawer, and seized same for prosecution of accused for vialation of Selective Service Act. Held: As incident to a lawful arrest, search may extend beyond the person of the one arrested to include the premises under his control. A general meticulous search of the entire apartment was not unreasonable, and seizure of fruits of crime was not prohibited by the Fourth Amendment to the Constitution of the United States. *Harris v. United States,* —U.S.—, 67 S.Ct. 1098 (1947).

The Fourth Amendment to the Federal Constitution[1] found its origin in the determination of the framers to secure the privacy of citizens, their homes, papers and effects, against unjustifiable invasions and seizures under the guise of law.[2] Such practices had been sanctioned and abusively perpetrated under the English "writs of assistance" in the American colonies prior to the American Revolution.[3] Its protection has been extended to all alike, whether accused of crime or not, and the duty of giving it force and effect is obligatory upon all entrusted under the federal system with the enforcement of the laws.[4]

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[16]Baird v. McNamara, 78 Miss. 455, 30 So. 69 (1901); Hicks v. Blackman, 74 Miss. 459, 21 So. 8 (1896); Cole v. Johnson, 53 Miss. 94 (1876).

[17]Pass v. McLendon, 62 Miss. 580, 583 (1885). *Accord:* Tinnin v. Brown, 98 Miss. 378, 53 So. 780 (1910); Stewart et al. v. Matheny, 66 Miss. 21, 5 So. 387 (1888). See Note (1924) 10 Va.L.Rev. 476.

[1]"The rights of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

[2]Weeks v. U.S., 232 U.S. 383, 34 S.Ct. 344, 58 L.Ed. 652 (1914); Boyd v. U.S., 116 U.S. 616, 6 S.Ct. 528, 29 L.Ed. 746 (1886); Kraus, *Modern Trend of the Law of Search and Seizure* (1943) 17 St. Johns L.R. 102.

[3]*Ibid.*

[4]Weeks v. U.S., *supra* note 2. Invoked by aliens, U.S. v. Wong Quong Wong, 94 F. 832 (D.C. Vt. 1899); does not apply to states, but is a limitation exclusively upon federal power. Gouled v. U.S., 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647

The broad underlying principle[5] of the Amendment has been universally recognized and accepted by all jurists; but its application in the field of criminal arrest has been somewhat inconsistent. Only those searches and seizures that are "unreasonable" come within its interdict[6]; and it has been adjudged that the test of reasonableness of search and seizure cannot be stated in rigid and absolute terms, but each case must be decided on its own facts and circumstances.[7]

That search and seizure without a search warrant, as an incident of lawful arrest is not unreasonable within the meaning of the edict is a doctrine of ancient origin,[8] and has continued to be an integral part of the law-enforcement procedure of the federal government.[9] The essential elements of the doctrine (where there has not been consent by the accused to the search[10]) are: that the arrest be lawful[11]; that the search be contemporaneous with the arrest[12]; and that the one arrested be present.[13]

The limit and extent of the search and seizure is where the divergency occurs. The earliest reported cases admitted the reasonableness of searching the person as an incident of lawful arrest.[14] This tenet has never been questioned.[15] The necessity of a search warrant or even a warrant for arrest has not been required;

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(1921); Barron v. Baltimore, 7 Pet. 243 (U.S. 1833); Nash v. State, 171 Miss. 279, 157 So. 365 (1934); Reed v. Rice, 25 Ky. 44 (1829). Does not apply to acts done in a private capacity. Bacon v. U.S., 97 F. 35, 38 C.C.A. 37 (C.C.A. 8th, 1899).

[5]"The rights of privacy and personal security protected by the Fourth Amendment are to be regarded as of the very essence of constitutional liberty; and the guaranty of them is as important and imperative as are the guaranties of the other fundamental rights of the individual citizen." Gouled v. U.S., *supra* note 4. "The fact that the effect of according the right to a particular person to be secure from unreasonable searches and seizures under the Fourth Amendment may be that he will go unwhipped of justice cannot determine the court's action." U.S. v. Bookbinder, 278 F. 216 (D.C. Pa. 1922). See, Weeks v. U.S., *supra* note 2; Boyd v. United States, *supra* note 2.

[6]Scher v. U.S., 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151 (1938); Carroll v. U.S., 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); Weeks v. U.S., *supra* note 2; U.S. v. Bookbinder, *supra* note 5.

[7]Go-Bart Importing Co. v. U.S., 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1931).

[8]Trial of Henry and John Sheares, 27 How.St.Tr. 255, 321 (1798): State v. Griswold, 67 Conn. 290, 34 A. 1046 (1896).

[9]Davis v. U.S., 328 U.S. 582, 66 S.Ct. 1256 (1946); Scher v. U.S., *supra* note 6; Sparks v. U.S., 90 F.(2d) 61 (C.C.A. 6th, 1937). Some cases hold that a search warrant must be used if the securing of it is reasonably practicable. Carroll v. U.S., *supra* note 6; Silverthorne Lumber Co. v. U.S., 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); Walker v. U.S., 125 F.(2d) 395 (C.C.A. 5th, 1942).

[10]Protection of Fourth Amendment may be waived by consent. Davis v. U.S., *supra* note 9; U.S. v. Bianco, 96 F.(2d) 97 (C.C.A. 2nd, 1938); U.S. v. Hart, 214 F. 655 (D.C.N.Y. 1914).

[11]Taylor v. U.S., 282 U.S. 1, 52 S.Ct. 466, 76 L.Ed. 928 (1932); Papani v. U.S., 84 F.(2d) 160 (C.C.A. 9th, 1936); U.S. v. McHie, 194 F. 894 (D.C. Ill. 1912).

[12]Agnello v. U.S., 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925); Silverthorne Lumber Co. v. U.S., *supra* note 9; U.S. v. Mounday, 208 F. 186 (D.C. Kan. 1913).

[13]Amos v. U.S., 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654 (1921); U.S. v. Derman, 66 F.Supp. 511 (D.C. N.Y. 1946). Must be the place of arrest also. Agnello v. U.S., *supra* note 12; U.S. v. Antonelli Fireworks Co., 53 F.Supp. 870 (D.C. N.Y. 1943); U.S. v. Schultz, 3 F.Supp. 273 (D.C. Ariz. 1933).

[14]Weeks v. U.S., *supra* note 2; Boyd v. U.S., *supra* note 2; State v. Edwards, 51 W.Va. 220, 41 S.E. 429, 59 A.L.R. 465 (1902).

[15]Kwong How v. U.S., 71 F.(2d) 71 (C.C.A. 9th, 1934); U.S. v. DiCorvo, 37 F.(2d) 124 (D.C. Conn. 1927); Garske v. U.S., 1 F.(2d) 620 (C.C.A. 8th, 1924); U.S. v. Strickland, 62 F.Supp. 468 (D.C. S.C. 1945).

but it is only necessary that the officer have a "probable cause" to believe a crime has been, is being, or will be committed.[16] It was later decided that the right of search and seizure without search warrant might, under appropriate circumstances, extend beyond the person of the one arrested, to include the premises under his control.[17] Under this doctrine, there has been a split, with some courts holding that only a "probable cause" to believe the commission of a crime is necessary to justify the search and seizure,[18] with others holding the better view that the search must be incidental to the arrest, and not for the purpose of securing evidence upon which to base an arrest.[19]

There has been no definite line established as to the territorial limits of a search incidental to an arrest. There is a right contemporaneously to search the "place" where the arrest is made,[20] whether a dwelling house or a business establishment[21]; and the search may validly extend beyond the room in which the accused is arrested,[22] but how far beyond is another contentious question.[23] The only rule of any utility is the generally accepted one that no "general exploratory" search may be made[24]; and that only those articles "in plain view" may be appropriated.[25] The decision of the principal case would seem to abrogate this rule.

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[16]Scher v. U.S., *supra* note 6; Husty v. U.S., 282 U.S. 694, 51 S.Ct. 240, 15 L.Ed. 629 (1931); Sparks v. U.S., 90 F.(2d) 61 (C.C.A. 6th 1937); Emite v. U.S., 15 F.(2d) 623 (C.C.A. 5th, 1926).

[17]Agnello v. U.S., *supra* note 12; Vecchio v. U.S., 53 F.(2d) 628 (C.C.A. 8th, 1932); Peru v. U.S., 4 F.(2d) 881 (C.C.A. 8th, 1925).

[18]Husty v. U.S., *supra* note 16; U.S. v. Lee, 274 U.S. 559, 47 S.Ct. 746, 71 L.Ed. 1202 (1927); Carroll v. U.S., *supra* note 6; Sparks v. U.S., *supra* note 16; Emite v. U.S., *supra* note 16.

[19]Gambino v. U.S., 275 U.S. 310, 48 S.Ct. 137, 72 L.Ed. 293 (1927). "Must warrant a cautious man in the belief that the suspect is guilty of the offense with which he is charged." U.S. v. Sebo, 101 F.(2d) 889 (C.C.A. 7th, 1939). U.S. v. Lee, 83 F.(2d) 195 (C.C.A. 2nd, 1936); U.S. v. Vleck, 17 F.Supp. 110 (D.C. Neb. 1937).

[20]Scher v. U.S., *supra* note 6; U.S. v. Lefkowitz, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877, 82 A.L.R. 775 (1932); Go-Bart Importing Co. v. U.S., *supra* note 7; Marron v. U.S., 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927); U.S. v. Lee, *supra* note 19; Bruce v. U.S., 73 F.(2d) 972 (C.C.A. 8th, 1934). Also may search places "in immediate vicinity." Safarik v. U.S., 62 F.(2d) 890 (C.C.A. 8th, 1933).

[21]Stricter requirements of reasonableness apply where a dwelling is involved. Davis v. U.S., *supra* note 9; Zap v. U.S., 328 U.S. 624, 66 S.Ct. 1277 (1946); Matthews v. Correa, 135 F.(2d) 534 (C.C.A. 2nd, 1943).

[22]Marron v. U.S., *supra* note 20; U.S. v. Lindenfeld, 142 F.(2d) 829 (C.C.A. 2nd, 1944); Matthews v. Correa, *supra* note 21; U.S. v. 71.41 Ounces Gold Filled Scrap, 94 F.(2d) 17 (C.C.A. 2nd, 1938).

[23]Moving freight (auto, motor-boat, etc.) may always be searched. Scher v. U.S., *supra* note 6; Husty v. United States, *supra* note 16; U.S. v. Lee, *supra* note 18; Haning v. U.S., 59 F.(2d) 942 (C.C.A. 8th, 1932); Appell v. U.S., 29 F.(2d) 279 (C.C.A. 5th, 1928); Milam v. U.S., 296 F. 629, cert. den. 265 U.S. 586, 44 S.Ct. 460, 68 L.Ed. 1192 (C.C.A. 4th, 1924). Search of house several blocks away unreasonable. Agnello v. U.S., *supra* note 12. Search of house "considerable distance away" unreasonable. Papani v. U.S., 84 F.(2d) 160 (C.C.A. 9th, 1936). Barn search unreasonable. U.S. v. DiCorvo, *supra* note 15. But see, Kelley v. U.S., 61 F.(2d) 843 (C.C.A. 8th, 1932); Safarik v. U.S., *supra* note 20; Martin v. U.S., 155 F.(2d) 503 (C.C.A. 5th 1946); and Hester v. U.S., 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924).

[24]U.S. v. Lefkowitz, *supra* note 20; Go-Bart Importing Co. v. U.S., *supra* note 7; U.S. v. 1013 Crates of Old Smuggler Whiskey Bottles and Other Property, 52 F.(2d) 49 (C.C.A. 2nd, 1931); U.S. v. Rembert, 284 F. 996 (D.C. Tex. 1922).

[25]U.S. v. Lefkowitz, *supra* note 20, and Go-Bart Importing Co. v. U.S., *supra* note 7, limiting Marron v. U.S., *supra* note 20; *In re* Ginsberg, 147 F.(2d) 749 (C.C.A. 2nd, 1945).

The probable keystone of this decision was the fact that the property concealed was stolen government property, the possession of which is a continuing crime. Some courts have made a distinction between the seizure of matter purely "evidentiary" of crime, and that which is identifiable as the "fruits" or "instrumentalities" of crime.[26] In the latter case, the possession of the articles is held to be a continuing crime, committed in the presence of the officers, and the question of the legality of the search is thus immaterial.[27]

This judgment is no doubt in line with the modern trend of the law of search and seizure, and will be applauded by some writers of legal treatises.[28] It is respectfully submitted, notwithstanding, that as a legal precedent, this adjudication opens the gate to the possibility mentioned in *United States v. Kirschenblatt*,[29] by Judge Learned Hand: "Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a different face, if used by a government determined to suppress political opposition under the guise of sedition".

*Loyd L. Beacham, Jr.*

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[26]Davis v. U.S., *supra* note 9; Wilson v. U.S., 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771 (1911); *In re* Ginsberg, *supra* note 25; U.S. v. 71.41 Ounces Gold Filled Scrap, *supra* note 22; U.S. v. Poller, 43 F.(2d) 911 (C.C.A. 2nd, 1930); U.S. v. Rembert, *supra* note 24.

[27]Martin v. U.S., 155 F.(2d) 503 (C.C.A. 5th, 1946); Benton v. U.S., 70 F.(2d) 24 (C.C.A. 4th, 1934); Milam v. U.S., 296 F. 629 (C.C.A. 4th, 1924); U.S. v. Sam Chin, 24 F.Supp. 14 (D.C. Md. 1938).

[28]Kraus, *Modern Trend of the Law of Search and Seizure* (1943) 17 St. Johns L.R. 103; Fairchild, *Freedom from Unreasonable Search and Seizure* (1940) 25 Marq. L.R. 103; Waite, *Reasonable Search and Seizure* (1921) 86 Pa.L.R. 623. Advocated, 8 Wigmore on Evidence, 31 et seq.

[29]16 F.(2d) 202, 203 (C.C.A. 2nd, 1926).

## BOOK REVIEW

MODEL PROBATE CODE by Lewis M. Simes and Paul E. Basye. University of Michigan Press and Callaghan & Co. Pp. 782. 1946. $10.00.

This book contains the Model Probate Code prepared for and to be presented to the Probate Division, Section of Real Property, Probate and Trust Law, American Bar Association. It was prepared and compiled by the Research Staff of the University of Michigan Law School. Most of the work appears to have been done by Professor Simes and Mr. Basye. Anyone familiar with their reputations may feel certain of a scholarly and accurate job. Naturally the Code largely follows the lead of the probate law and practice of most states. Its aims are to simplify probate law and practice and it is not argued that it should be adopted unchanged in every state but rather than it should be fitted properly in the present framework of the probate law of each state.

It wisely refrains from covering too much ground and follows the method of the Federal Rules of Civil Procedure in not trying to cover too much in detail but rather to lean to the side of flexibility.

Among its more important features are its attempts to make probate courts coordinate with trial judges, to permit administration without notice (which we already have in Mississippi), to give the probate courts jurisdiction over lands, to permit only one contest of a will, to combine notice to creditors with the original notice, to insure speedy administration, to give the decree of distribution more significance in determining title, to reduce the number of appeals and to provide for dispensing with administration.

A number of things suggested by the Code are unnecessary in Mississippi because of the fact that our Chancery Courts also have probate jurisdiction and we thus do not have the problems that arise from the existence of separate probate courts. Nevertheless, a good many parts of this Code might well be adopted in Mississippi so as to simplify and hasten administration of estates. Certainly it is the opinion of this reviewer that the time for probating claims against an estate should be reduced from six months to three months.

This book also contains many valuable notes on statutes, an article on the Organization of Probate Courts by Professor Simes and Mr. qBasye, an article on administration as proceeding in rem by Professor Simes, an article on the Venue of Probate and Administration Proceed-

ings by Mr. Basye, an article on dispensing with Administration by Mr. Basye and an article on the Function of Will Contests by Professor Simes.

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## STATE BAR SECTION

### The Proposed Uniform Divorce Recognition Act

*Dugas Shands and Gibson B. Witherspoon**

*Introductory Note*: The National Conference on Uniform State Laws, composed of commissioners appointed by the governors of the several states, has met each year since 1892 with the object of promoting "uniformity in states laws on all subjects where uniformity is deemed desirable and practicable." The uniform acts which the National Conference has proposed and the extent of their adoption are set out, for the information of the Bar, in the table *infra*. The Commissioners are working on a Uniform Commercial Code which will be ready in 1950. There are other laws, which may be beneficial to our state, which will be recommended from time to time.

The present day need in Mississippi for the proposed Uniform Divorce Recognition Act, and the act itself, will be presented in this article.

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The recent decisions of the United States Supreme Court in the two cases of *Williams v. North Carolina*[1] have focused attention anew on the serious problem of divorce recognition among the states resulting from the prevailing practice of residents of one state journeying to another in order to take advantage of laxer and more speedy divorce procedures than those afforded by the states of their domicile. Briefly stated, these cases hold that a state in which one of the parties to a marriage has achieved a bona fide domicile acquires jurisdiction to affect the status of that party as to a decree of divorce or annulment of marriage. Yet it is equally clear that another state may, nevertheless, refuse to recognize a decree of divorce obtained by one of its domiciled citizens in a court of anothr jurisdiction. The Mississippi Supreme Court has twice so ruled within recent years.[2]

These cases reinforce the need for a specific enunciation by the various states of the conditions under which foreign divorces obtained in such states as Arkansas, Florida and Nevada will be recognized. While all agree that the so-called "Mexican Mail Order" divorces should not

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[1]317 U.S. 287 (1942); second case, 352 U.S. 226 (1945).

[2]Hopkins v. Hopkins, 174 Miss. 643, 165 So. 414 (1936); Miller v. Miller, 173 Miss. 44, 159 So. 112 (1935).

be recognized in the light of the rules of international comity, under the common law of most jurisdictions a divorce obtained by a resident of the domicillary state from a court of another jurisdiction on a "tourist court" basis is without force and effect.[3]

Public opinion increasingly recognizes the ills which spring from this unfortunate situation. The validity of subsequent marriages, the status of children, titles to property, rights of inheritance and many other vital incidents of life are rendered uncertain by the cloud of invalidity hanging over these "tourist" divorce decrees.

The National Conference on Uniform State Laws has considered this problem for many years. The great difference in policies among the various states has rendered promulgation of a uniform law to correct this situation difficult, but it is felt that the proposed act hereinafter set forth can accomplish the desired end. The public in general and the members of the Bar in particular are urged not to lag behind in supporting the proposed act, which is:

Be it enacted . . .

Section 1. A divorce from the bonds of matrimony obtained in another jurisdiction shall be of no force or effect in this state if both parties to the marriage were domiciled in this state at the time the proceeding for the divorce was commenced.

Section 2. Proof that a person obtaining a divorce from the bonds of matrimony in another jurisdiction (a) was domiciled in this state within twelve months prior to the commencement of the proceeding therefor and resumed residence in this state within eighteen months after the date of his departure therfrom, or (b) at all times after his departure from this state and until his return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.

Section 3. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it.

Section 4. This act may be cited as the Uniform Divorce Recognition Act.

Section 5. All acts or parts of acts which are inconsistent with provisions of this act are hereby repealed.

Section 6. This act shall take effect . . .

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[3]Bethune v. Bethune, 192 Ark. 811, 92 S.W.(2d) 1043, 105 A.L.R. 814 (1936); St. Sure v. Lindsfeldt, 82 Wis. 346, 52 N.W. 308, 19 L.R.A. 515, 33 Am.St.Rep. 50 (1892); Hopkins v. Hopkins, *supra* note 2; Miller v. Miller, *supra* note 2.

RECORD OF PASSAGE OF UNIFORM ACTS SPONSORED BY

UNIFORM ACTS

| | 1 Negotiable Instruments (1896) | 2 Warehouse Receipts (1906) | 3 Sales (1906) | 4 Bills of Lading (1909) | 5 Stock Transfer (1909) | 6 Desertion and Non-Support (1910) | 7 Partnership (1914) | 8 Limited Partnership (1916) | 9 Fraudulent Conveyances (1918) | 10 Proof of Statutes (1920) | 11 Foreign Depositions (1920) | 12 Declaratory Judgements (1922) | 13 Fiduciaries (1922) | 14 Federal Tax Lien Registration (1926) | 15 Reciprocal Transfer Tax (1928) | 16 Veterans' Guardianship (1928) | 17 Principal and Income (1931) | 18 To Secure Attendance of out of State Witnesses (1931) | 19 Narcotic Drug (1932) | 20 Trust Receipts (1933) | 21 Transfer of Dependents (1935) | 22 Vendor and Purchaser Risk (1935) | 23 Criminal Extradition (1936) | 24 Business Records as Evidence (1936) |
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| Alabama | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Alaska | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Arizona | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Arkansas | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| California | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Colorado | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Connecticut | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Delaware | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| District of Columbia | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Florida | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Georgia | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Hawaii | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Idaho | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Illiñois | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Indiana | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Iowa | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Kansas | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Kentucky | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Louisiana | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Maine | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Maryland | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Massachusetts | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Michigan | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Minnesota | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Mississippi | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Missouri | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Montana | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Nebraska | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Nevada | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| New Hampshire | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| New Jersey | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| New Mexico | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| New York | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| North Carolina | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| North Dakota | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Ohio | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Oklahoma | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Oregon | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Pennsylvania | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Philippine Islands | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Puerto Rico | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Rhode Island | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| South Carolina | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| South Dakota | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Tennessee | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Texas | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Utah | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Vermont | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Virginia | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Washington | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| West Virginia | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Wisconsin | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| Wyoming | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ | ○ |
| TOTAL | 53 | 52 | 37 | 33 | 51 | 21 | 28 | 30 | 20 | 29 | 11 | 35 | 21 | 24 | 19 | 41 | 14 | 38 | 45 | 24 | 7 | 7 | 34 | 16 |
| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | 23 | 24 |

# THE AMERICAN BAR ASSOCIATION, AS OF JULY 31, 1947

| 25 | 26 | 27 | 28 | 29 | 30 | 31 | 32 | 33 | 34 | 35 | 36 | 37 | 38 | 39 | 40 | 41 | 42 | 43 | 44 | 45 | 46 | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Judicial Notice of Foreign Law (1936) | Official Reports as Evidence (1936) | Trustees' Accounting (1936) | Trusts (1937) | Property (1938) | Unauthorized Insurers (1938) | Common Trust Fund (1938) | Absentees' Property (1939) | Acknowledgment (1939) | Participation by Secured Creditors in Insolvent Estates (1939) | Joint Tortfeasors (1939) | Insurers Liquidation (1939) | Statute of Limitations (1939) | Pistol (1940) | Simultaneous Death (1940) | Vital Statistics (1942) | Interstate Arbitration of Death Taxes (1944) | Interstate Compromise of Death Taxes (1944) | Powers of Foreign Representatives (1944) | Reverter of Realty (1946) | Act Relating to Realty (1946) | Criminal Statistics (1946) | |
| — | — | — | — | — | — | — | — | — | — | — | O | — | — | — | O | — | — | — | — | — | — | Alabama |
| — | — | — | — | — | — | O | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | Alaska |
| — | — | — | — | — | — | O | — | O | — | — | — | — | — | — | — | — | — | — | — | — | — | Arizona |
| — | — | — | — | — | O | O | — | O | — | O | — | — | — | O | — | — | — | — | — | — | — | Arkansas |
| — | — | — | — | — | — | O | — | — | — | — | — | — | — | O | — | — | — | — | — | — | — | California |
| — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | Colorado |
| O | — | — | — | — | — | — | — | O | — | — | — | — | — | O | — | O | O | — | — | — | — | Connecticut |
| — | — | — | — | — | — | — | — | — | — | — | — | — | — | O | — | — | — | — | — | — | — | Delaware |
| — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | District of Columbia |
| — | — | — | — | — | — | O | — | O | — | — | — | — | — | O | — | — | — | — | — | — | — | Florida |
| — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | Georgia |
| O | — | — | — | — | — | — | — | O | — | O | — | — | — | O | — | — | — | — | — | — | — | Hawaii |
| — | O | — | — | — | — | — | — | O | — | — | O | — | — | O | — | — | — | — | — | — | — | Idaho |
| O | — | — | — | — | — | O | — | O | — | — | O | — | — | O | — | — | — | — | — | — | — | Illinois |
| O | — | O | — | — | — | — | — | — | O | — | — | — | — | O | — | — | — | — | — | — | — | Indiana |
| — | — | — | — | — | — | — | — | O | — | — | — | — | — | O | — | — | — | — | — | — | — | Iowa |
| O | — | O | — | — | — | — | — | O | — | — | — | — | — | O | — | — | — | — | — | — | — | Kansas |
| O | — | — | — | — | — | — | — | — | — | — | — | — | — | O | — | — | — | — | — | — | — | Kentucky |
| — | — | — | O | — | O | — | — | — | — | — | — | — | — | — | O | — | — | — | — | — | — | Louisiana |
| O | — | — | — | — | — | — | — | — | — | — | — | — | — | O | — | — | — | — | — | — | — | Maine |
| O | — | — | — | — | — | — | O | O | — | O | O | — | — | O | — | O | O | — | — | — | — | Maryland |
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